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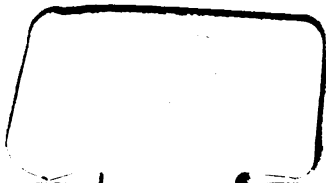
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REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS

VOLUME XXXV

**CONTAINING CASES IN WHICH OPINIONS WERE FILED IN THE FIRST DISTRICT
IN DECEMBER, 1889, AND JANUARY, FEBRUARY,
MARCH, APRIL AND MAY, 1890.**

REPORTED BY
EDWIN BURKITT SMITH
OF THE CHICAGO BAR

CHICAGO
CALLAGHAN & COMPANY
1891

Entered according to act of Congress, in the year 1891,
By CALLAGHAN & COMPANY,
In the office of the Librarian of Congress, at Washington, D. C.

Rec. June 3, 1891

Stereotyped and Printed
by the
Chicago Legal News Company.

OFFICERS OF THE
APPELLATE COURTS OF ILLINOIS

DURING THE TIME OF THESE REPORTS.

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THOMAS A. MORAN, <i>Judge</i> ,	Chicago.
JOHN J. HEALY, <i>Clerk</i> ,	Chicago.

SECOND DISTRICT.

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C. B. SMITH, <i>Judge</i> ,	Champaign.
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J. J. PHILLIPS, <i>Judge</i> ,	Hillsboro.
JOHN W. BURTON, <i>Clerk</i> ,	Mt. Vernon.

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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—OCTOBER TERM, 1889.

EMMA T. HEALY
V.
THE MUTUAL ACCIDENT ASSOCIATION OF THE
NORTHWEST.

Accident Insurance—Policy—Conditions—Poison—Inadvertent Taking of.

A death occasioned by the accidental drinking of poison or an excessive quantity of a dangerous drug, is not within a condition in a policy setting forth that the same would become payable if assured, "shall have sustained bodily injuries received by, or through, external, violent, and accidental means" "and such injuries alone shall have occasioned death."

[Opinion filed December 2, 1889.]

IN ERROR to the Circuit Court of Cook County; the Hon.
ABBA N. WATERMAN, Judge, presiding.

(17)

VOL. 35.] Healy v. Mut. Accident Ass'n of the Northwest.

Messrs. MILLER, LEMAN & CHASE, for plaintiff in error.

Messrs. ALBERT H. VEEDER and MASON B. LOOMIS, for defendant in error.

While it is a rule applicable to insurance and other contracts, that they are to be construed most strongly against the party making the promise, yet this rule does not go so far as to authorize a construction against the insurer, or promisor, merely because that view is possible. On the contrary, in the absence of anything to show that the terms of such contract are intended to be understood in a particular or special sense, courts will go no further than to hold the insurer or the promisor liable to the extent which the other party had a right to understand from the terms of the instrument, when viewed in their ordinary and commonly received acceptation. Bliss on Life Insurance, Sec. 542.

In the construction of policies of insurance their words should be taken in that sense to which the apparent object and intention of the parties limit them, and which is to be gathered from the surrounding clauses and from all parts of the instrument. Paul v. Travelers Ins. Co., 112 N. Y. 479; Yeaton v. Fry, 5 Cranch, 335.

The point is made by the learned counsel for plaintiff, that the "taking of poison" within the meaning of the proviso in this policy does not refer to or include the accidental injuries alleged in the declaration, or an accidental death from "taking or swallowing a drug or poison causing death," etc. And it is argued that the "taking of poison," as here used, does not mean that which happens by accident, but only that which involves some intentional act, or, in other words, suicide. That this is not the meaning, is evident from the fact that after using this language, the policy goes on to recite that "no claim shall be made under this certificate when the death * * * may have been caused * * * by suicide * * * or self-inflicted injuries." Thereby expressly providing for all cases of death by intentional means. And the case cited by counsel in support of their position, Lawrence v. Mut. L. Ins. Co., 5 Ill. App. 280, goes no further than to hold

that the taking of repeated doses of laudanum by the insured, to alleviate pain, from the effect of which he died, can not be termed an act of "self-destruction" within the meaning of a policy which provided that "the self-destruction of the person, whether voluntary or involuntary, and whether he be sane or insane, is not a risk assumed by the company."

The counsel seem, also, to be mistaken as to the construction placed upon the clause "inhaling gas," by the court, in *Paul v. Travelers Ins. Co.*, 112 N. Y. 472. There the court does not say or intimate that, if Paul had inhaled the gas knowingly and voluntarily, but without the intention of killing himself, that it would not have been within the prohibition of the policy. On the contrary, the court, in illustrating the difference between the unconscious act of breathing in gas, and the "inhaling" of it, within the meaning of the policy, says: "Poison may be taken by mistake, or poisonous substances may be inadvertently touched, but whatever the motive of the insured, his act precedes either fact."

This and the preceding language used by the court, is not that the gas was inhaled accidentally, but that it was not "inhaled," at all, within the meaning of the policy. And it may be safely asserted that if ever a case comes before the learned Court of Appeals of the State of New York under a similar policy, where it clearly appears that the insured came to his death by means of knowingly and consciously "inhaling gas," whatever the motive of the insured, the court will not ignore this proviso in the policy, or hold the company liable.

As stated hereinbefore, the principal object of the restrictive clauses and provisos referred to in these policies of accident insurance, was to prevent imposition upon the companies and associations by unscrupulous, designing persons, and to that end these particular clauses were inserted, so that, in every case, in so far as possible, there should be outward, tangible evidence of the cause of death; and for this reason deaths "in consequence of disease," or "by the taking of poison" and not the result of injuries received by or through "external, violent and accidental means," were excluded from the benefits of the policy. And even though it should be held that

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the words "taking of poison" in the policy, related only to an intentional taking, yet the insuperable barrier to a recovery on the part of plaintiff still remains—that the death of Healy resulted from internal causes, and not from "bodily injuries received by or through external, violent and accidental means, within the intent and meaning of the certificate of organization of said association," or within the intent and meaning of the certificate of membership sued upon. As was well said by the learned chief justice who delivered the opinion in *Pollock v. U. S. Mut. Acc. Ass'n*, 102 Pa. St. 230, "To hold the association liable for a death caused by taking poison would not only be in conflict with the letter of the agreement, but contrary to the whole purpose for which the association appears to have been formed."

GARY, P. J. The single question in this case is whether, under a policy of life insurance becoming payable if the assured "shall have sustained bodily injuries received by or through external, violent and accidental means," "and such injuries alone shall have occasioned death," a loss has occurred when the death was caused "by accidentally taking and drinking poison," or "by accidentally taking poison" or because the assured "accidentally swallowed an overdose or excessive quantity of a certain drug, to wit, chloral." By the different counts of the declaration these causes of death are alleged. The Circuit Court sustained a demurrer on the ground that death from such a cause was not within the policy. The only authority for the plaintiff below and here, is the disapproval, first by the Supreme Court, and afterward by the Court of Appeals of New York in *Paul v. Travelers Insurance Co.*, 45 Hun, 313 (112 N. Y. 472), of the case of *Hill v. Hartford Co.*, 22 Hun, 187, holding that where the assured, by inadvertence, drank poison which he had himself mixed with water and left in a glass, and then drank the contents supposing it to be clear water, from which he died, this was not a death caused by injury through external, violent, accidental means. In accord with this last case are the cases of *Pollock v. U. S. Mut. Acc.*, 102 Penn. St. 230, where birch oil was

 Hellmuth v. Katschke.

drunk under the supposition that it was something else, and, Bayless v. Travelers Ins. Co., 14 Blatch. 143, where a dose of opium, larger than prescribed, was taken by mistake. There is no case cited to the contrary of these. Cases of drowning, and of suffocation by gas, have been held to be losses within such policies. Trew v. Ins. Co., 5 Hurlst. & N. 211, 6 Hurlst. & N. 839, and Paul v. Travelers Ass. Co., 112 N. Y. 472, are examples. A reference to the cases is all that is here necessary.

There is no authority for the unnatural and forced construction that the plaintiff seeks to have put upon the words, and the judgment is affirmed.

Judgment affirmed.

MICHAEL HELLMUTH

V.

CHARLES KATSCHKE.

Master and Servant—Negligence of Vice Principal—Injury to Servant—Fellow-Servant—Evidence—Subsequent Declaration—Res Gestæ—Instructions—Abstract.

1. An instruction complained of will not be considered by this court unless all the instructions given are set out in the abstract.

2. In an action brought by a servant against his employer to recover for personal injuries alleged to have been suffered through the negligence of a superior servant, this court declines to interfere with the judgment in behalf of the plaintiff.

3. A declaration of a fellow-servant in such case, subsequent to the injury, that he was responsible therefor, is not admissible as a part of the *res gestæ*.

[Opinion filed December 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

MESSRS. CASE, JUDSON & HOGAN, for appellant.

MESSRS. C. C. WILSON and SYDNEY STEIN, for appellee.

MORAN, J. Appellee recovered a judgment for the sum of \$1,500 against appellant, for injuries received by being struck by a barrel which fell from a platform, where it was, it is alleged, improperly placed by appellant's foreman. The evidence tended to show that the barrel which fell on appellee was placed on the platform on the outside of the second story of the cooper shop in which appellee was working; that it was so placed by appellant's foreman, and that shortly after being so placed it fell on appellee while he was in the exercise of proper care, and inflicted upon him the injury for which judgment was rendered.

There was evidence from which the jury might reasonably infer that the barrel was carelessly and improperly placed on the platform by the foreman, and also evidence showing the authority and duty of the foreman, from which they were authorized to find that he was not a fellow-servant of appellee, but that he stood in the relation of superior, and in the place of the master. The verdict was then justified by the evidence.

Complaint is made that the court refused to admit evidence offered by appellant. Appellant sought to show by a witness, that one Toms, who was fellow-servant with appellee, came running down from the second story of the cooper shop just after the barrel fell on appellee, and claimed that he, Toms, had thrown a barrel on appellee, and it is now urged that such statement of Toms was admissible as part of the *res gesta*. It was not *res gesta* at all. It was not concurrent with the injury, but was made after the barrel fell, and was a mere narrative of what Toms had done. It would have been clear error to admit such evidence. Chicago West Division Ry. Co. v. Becker, 128 Ill. 545. Counsel has made no such abstract of instructions as requires us to examine them for error, under the rules of this court. Where a point is made on an instruction, all the instructions given by the court to the jury should be set out in the abstract.

We have, however, examined the one instruction abstracted, which it is alleged was erroneous, and we are of opinion that no error is shown. The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

PETER JENSEN AND THEODORE JOHNSON

V.

WILLIAM C. FRICKE AND CHARLES P. DOSE.

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44 328

Appeals—Affidavit of Merits—Failure to Obey Orders to File—Dismissal.

This court holds as erroneous an order dismissing an appeal from a justice court for the reason that an order entered at the same term the justice's transcript was filed in the trial court, upon appellants, to file an affidavit of merits, was not complied with.

[Opinion filed December 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. EDWARD T. CAHILL, for appellants.

No appearance for appellees.

GARNETT, J. This action was begun by appellees against appellants before a justice of the peace. Judgment was rendered in appellee's favor for \$114, and appellants appealed to the Superior Court.

The transcript of the justice was filed in the Superior Court at the June term of this year and at the same term an order was entered on appellants to file an affidavit of merits. Failing to comply with the rule, the court, at the term, entered an order dismissing the appeal for appellant's failure to obey the rule. The action of the court was in conflict with the doctrine of *Martin v. Hochstadter*, 27 Ill. App. 166. The judgment must be reversed and the cause remanded.

Reversed and remanded.

35	24
54	632

EMILIE PULVER, FOR USE, ETC.,

V.

ROCHESTER GERMAN INSURANCE COMPANY.

Fire Insurance—Excessive Claim—Evidence.

In an action against an insurance company to recover upon one of its policies, said company contending that the amount of goods claimed to have been consumed was exaggerated, it is *held*: That the trial court erred in admitting the testimony of firemen present at the fire, and of persons viewing the premises the day after the fire, the effect thereof being to show that the claim set up was excessive.

[Opinion filed December 2, 1889.]

IN ERROR to the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

MESSRS. KRAUS, MAYER & STEIN, for plaintiff in error.

MESSRS. MOSES, NEWMAN & PAM, for defendant in error.

GARY, P. J. This was an action upon a policy of fire insurance. On the trial the company defended mainly on the ground that no such quantity of goods as the appellant claimed, had been destroyed. The goods were a stock of women's apparel in a store conducted by, or in the name of the appellant. What, if any, objection the company made to her title to the goods, does not very clearly appear. Whether it was good against the creditors of her vendor, was a question with which the company could not meddle. *Phoenix Ins. Co. v. Mitchell*, 67 Ill. 43.

Whether the appellant's loss was exaggerated or not, was a question for the jury upon conflicting evidence, with certainly no great preponderance of competent evidence in support of the defense.

Against the objection and exception of the appellant, fire-

Hawkins v. Harding.

men, witnesses for the company, were permitted to testify that among firemen there was such a term as a "skin fire," "that applies to a fire that has run around the room very rapidly and destroyed light material. Still there is but very little burning, but everything that is very combustible will be destroyed." Then they were permitted to characterize the fire in this case as a "skin fire." They were also permitted, not only those who were present at the fire, but one who saw the premises the next day, to testify, that in their opinion it was "physically impossible" that the amount of goods could have been destroyed as the appellant claimed. That this opinion was incompetent evidence has been decided by the Supreme Court and by this court, in another case between this appellant and another company, for the same loss. *Birmingham Ins. Co. v. Pulver*, 126 Ill. 329; 27 Ill. App. 17.

This incompetent evidence may have turned the scale against the appellant. A jury would very likely attach a good deal of weight to the opinions of men whom they might suppose knew more of the matter from personal observation, than they could find out from testimony, and when slang phrases and a foundation for ridicule were added to the opinions, it is not strange that the verdict was against the appellant, even if she had a good case. Whether she has or not is a question for another jury, with evidence of this character excluded. This is not a case in which it can be seen that the jury were not influenced by the incompetent evidence, as in *Crist v. Wray*, 76 Ill. 204.

The judgment is reversed and the cause remanded.

Reversed and remanded.

C. HAWKINS ET AL.

v.

G. F. HARDING.

Judgments—Satisfaction of Record—Rule to Show Cause—Bill of Exceptions—Mandamus to Compel Judge to Sign—Practice.

1. It is proper to refuse to enter a rule to show cause why a judgment should not be satisfied of record, where the affidavits filed show only grounds existing before the entry thereof.

2. The filing of a petition for mandamus herein and the issuance of summons, to the end that a judge of the Superior Court should sign a bill of exceptions, is improper without first obtaining leave to file.

[Opinion filed December 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. D. BLACKMAN, for appellants.

Mr. WILLIAM J. AMMEN, for appellee.

MORAN, J. The only question presented by this appeal is the refusal of the court to enter a rule on appellees to show cause why a certain judgment should not be satisfied of record. We think the rule was properly refused. Such rule must be based on matters occurring subsequent to the judgment.

The affidavits filed in support of the rule show only grounds which were in existence long prior to the entry of the judgment. We find no cases in which the rule has been allowed on matters existing before judgment, and in the case cited by counsel the rule went on proof of satisfaction accepted after the judgment was entered. *Lee v. Brown*, 6 Johnson, 132.

The order denying the rule to show cause must be affirmed.

A petition for mandamus to compel the judge of the Superior Court to sign a bill of exceptions has been filed in this court entitled in this case, and a motion to quash the writ has been made and is submitted with the case on suggestions of counsel for the respective parties.

The petition was filed and summons issued without the leave of this court, on the theory that the statute regulating the practice in mandamus in the Circuit Courts was applicable to this court. This is a mistake. By Sec. 10 of the Appel-

Mantonya v. Huerter.

late Court Act, it is provided that the process, practice and pleading in the Appellate Court shall be the same as that prescribed by the Supreme Court.

The practice in mandamus in the Supreme Court is shown in *The People ex rel. Cunningham v. Thistlewood*, 103 Ill. 139, where it is held that a petition to the court for leave to file before summons can be issued is necessary. The motion to quash the petition will therefore be granted.

Order affirmed and mandamus quashed.

L. B. MANTONYA
v.
PETER J. HUERTER.

*Practice — Continuance — Affidavits of Physicians and Attorney—
Absence on Account of Ill Health—Nervous Prostration—Deposition—
Failure to Take—Witnesses.*

1. Where a continuance is sought on account of the absence of a party in interest who is expected to testify as a witness, a higher degree of diligence is required to procure his attendance or deposition than where the absent witness is a stranger to the suit.

2. Affidavits in support of a motion for a continuance based upon the absence of a party to the suit through ill health should set up his expectation as to returning, or the probability of obtaining his testimony at some future time.

3. In the case presented, this court holds that the affidavits filed contained nothing inconsistent with the view that defendant's deposition might have been taken before he went abroad; that they are vague and uncertain as to his health and the length of time he had been ill when he left the city; that nothing definite is stated as to the time of his return; and declines to interfere with the ruling of the trial court denying the motion in question.

[Opinion filed December 2, 1889.]

APPEAL from the Superior Court of Cook County; the
HON. KIRK HAWES, Judge, presiding.

MESSRS. CRATTY BROTHERS & ASHCRAFT and SEYMOUR KISH,
for appellant.

Mr. ARNOLD TRIPP, for appellee.

GARNETT, J. When this cause was reached for trial on April 14, 1889, the attorney for defendant, Mantonya, moved for a continuance, supporting his motion by affidavits. The ruling of the court in denying the motion is the only point made for the reversal of the judgment. The affidavits for continuance are made by two physicians and defendant's attorney. It appears therefrom that defendant had been for some time previous to, and was up to the time of the trial, suffering from nervous prostration; that it was the opinion of the physicians that it was necessary for him to give up all personal attention to business and the anxieties attendant thereon; that they had advised him to go to Europe and remain away from Chicago for several months, and that in his then condition it would be very unsafe for defendant to be subjected to the excitement which would necessarily attend his appearing upon the witness stand as a witness in his own behalf in any cause in which he would be likely to be cross-examined. It appears from the affidavit of his attorney that defendant left Chicago *en route* for Europe, March 21, 1889, in compliance with such medical advice, and the attorney also swears that defendant's deposition was not taken because it was only known that he was about leaving a few days before he in fact did leave, and because he was not in a condition to bear the anxieties of examination and cross-examination upon the matters in dispute.

Nothing sworn to in these affidavits is inconsistent with the supposition that Mantonya's deposition might, and should have been taken before he departed for Europe. The suit was begun December 15, 1887, and the issues were formed February 3, 1888, so that there was ample time for taking the depositions if the circumstances warranted that course. The affidavits are very vague as to the length of time Mantonya had been ill before the trial. One physician swears he had been suffering "for some time past from nervous prostration

Cudahy v. Powell.

which has assumed a serious aspect during the past few months;" the other, that "he has, for a considerable time, and still is suffering from nervous prostration;" while the attorney swears that "he has been an invalid for many months past." All that may be true, and still he may have been advised by his physicians to go to Europe, and determined to adopt their counsel, before his malady disqualified him for the excitement of cross-examination. The affidavits do not state *when* the European trip was advised, nor *when* he determined to go. In stating that "it was only known that he was about leaving a few days before he in fact did leave," his attorney presumably speaks for himself alone, as he could not swear when it was *first* known to the defendant.

Again, there is nothing to show any expectation that he will ever return, or that his testimony can be procured at any future time. The authorities hold that such expectation should appear from the affidavit. *Shook v. Thomas*, 21 Ill. 87; *Richardson v. People*, 31 Ill. 170.

When a continuance is sought on account of the absence of a party in interest who is expected to testify as a witness, a higher degree of diligence is required than when the absent witness is a stranger to the suit. *Quincy Whig Co. v. Tillson*, 67 Ill. 351.

The ruling of the court is clearly right. The judgment is affirmed.

Judgment affirmed.

MRS. M. CUDAHY

v.

ALICE POWELL.

Malicious Prosecution—Larceny—Probable Cause—Arrest without Process—Damages—Trespass.

1. An arrest without process must be justified in order to excuse whoever concurred in causing it.

2. All persons who order, direct, aid, abet or assist the commission of a trespass, are liable for all the damages.

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44	249
44	514
55	29
66	191
66	192
35	29
86	675

3. This court will not reverse because the verdict may be against the evidence, unless it is apparent that upon another trial before a jury, the result would be different.

4. In an action brought to recover damages for causing the arrest of plaintiff upon the ground of larceny, this court declines to interfere with the verdict in her behalf.

[Opinion filed December 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

MESSRS. CAMPBELL & CUSTER, for appellant.

MESSRS. LOUIS WASHINGTON and LEVI SPRAGUE, for appellee.

GARY, P. J. The single question in this case is, whether the appellee was arrested by the authority, expressed or implied, of the appellant. The appellant had lost, but has never been able to ascertain how, a valuable shawl. For six months she heard nothing of it. Then, from her sister, she learned that a lady had been seen wearing it on the street. It is useless to detail all the evidence. The appellant watched the house where the lady who was wearing the shawl had gone in. As she did not come out, the appellant and a lady friend went to the police. The final result was, that at the house of that lady friend—that lady friend and her daughter as well as the appellant being present—the police brought the appellee with her shawl; the appellant identified the shawl, and the police, without process, took the appellee to a police station where she was locked up for a couple of days.

The lady friend of the appellant seems to have been the most voluble in explaining to the police the wishes of the appellant, but on the trial, neither she nor her daughter was a witness. On a conflict of evidence, with certainly not a preponderance in favor of the appellee, the jury found for her. "This court will not reverse because the verdict may be against the evidence, unless it is apparent that upon another trial before a jury, the result would be different; and where

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there is as much conflict in the evidence as this record discloses in this case, it would be mere conjecture to say another jury would find differently." *East v. Crow*, 70 Ill. 91-4.

This quotation is but an effort to vary the form of the proposition so often laid down, that the verdict of a jury, upon conflicting evidence, settles the facts. The appellant had the advantage of having the case tried as one for a malicious prosecution, with the burden on the appellee of proving malice and want of probable cause on the part of, as well as an arrest by, the appellant.

The arrest being without process must be justified, in order to excuse whoever concurred in causing it. 1 Ch. Pl. 133, 186, 501, Ed. 1844. "All persons who order, direct, aid, abet or assist the commission of a trespass, are liable for all the damages." *Ferriman v. Fields*, 3 Ill. App. 252; *Roth v. Smith*, 41 Ill. 314.

It was a fair question for the jury upon all the circumstances shown, whether the police, in taking the appellee to the station, were acting in accordance with directions, expressed or implied, of the appellant so to do. There is no error and the judgment is affirmed.

Judgment affirmed.

WILLIAM H. GRIMLEY

v.

PEARL DAVIDSON.

Contracts—Party Walls—Conditions—Building of Entire Wall on Land of Another—Subsequent Agreement—Consideration—Light and Air—Obstruction of.

1. Where express words in a contract fairly and legitimately require an inference as to their intention, the intention thus inferred is just as truly a part of the contract as the clearly expressed undertaking.

2. Upon a bill filed to prevent a neighboring land owner from constructing openings in an extension of a party wall, and placing windows therein.

this court holds that the agreements of complainant as set forth in a certain written contract signed by him and the defendant, were based upon a valuable consideration, and that his intention to allow the making of such windows, and the preservation thereof, free from any obstruction of the light, is plainly discoverable therefrom.

[Opinion filed December 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

MR. THOMAS J. SUTHERLAND, for appellant.

Messrs. WEIGLEY, BULKLEY & GRAY, for appellee.

In the case of *Dooley v. Crist*, 25 Ill. 566, the court held, that where a stranger constructs a building upon the land of another, without his consent, it becomes part of the land and he would become a trespasser in removing it.

Again in *Hilliard on Real Property*, Vol. 1, p. 5, it is said: "If one man erect buildings upon the land of another voluntarily and without any contract, they become a part of the land and the former has no right to remove them. Such buildings are *prima facie* part of the realty."

And again, in the case of *Mathes et al. v. Dobschnetz*, 72 Ill. 441, the court, in speaking upon this question, say: "The improvements made upon the property in controversy were placed there without the consent of the owners of the fee. They were constructed by a stranger to the property. He neither had title or interest in it. The improvements when made became part and parcel of the land, and the title to them became vested in the owners of the fee, unless there are facts connected with this case to take it out of the operation of the general rule."

The contract in question recites facts showing that this wall stood upon the land of the appellee. It then further recites that she has paid for that wall the full moiety thereof. That is sufficient consideration.

The law is well settled that whenever the consideration is not expressed in a written contract, it may be shown *aliunde*.

The case of *Tingley v. Cutler*, 7 Conn. 291, was a case founded upon a written contract to purchase certain land. It was urged that the document failed to show any consideration. Held, that it was not necessary that the consideration should be expressed in the writing; that it might be collected from the evidence and circumstances submitted to the jury.

In the case of *Waterman v. Waterman*, 27 Fed. Rep. 827, which was a suit in equity to compel the specific performance of a contract for the conveyance of certain mines, it was urged that the contract failed to show any adequate consideration. Mr. Justice Savage, in rendering the opinion of the court, said that the real consideration might be shown although the contract states only a nominal one.

In the case of *Arms v. Ashley*, 4 Pick. 70, the court say: "No consideration, it is true, is expressed in the writing, as passing from the plaintiff to E. Ashley, but a consideration may be proven *aliunde*. It seems also to be well settled that parol evidence is admissible to show a consideration for the conveyance when the same is not so expressed in the deed. * * * It is impossible to say that this evidence is repugnant to the deed, for nothing can be collected from the deed touching the consideration or the payment of the purchase money. It is true that the presumption is that payment was made or satisfactorily secured, but this presumption being a species of evidence in relation to a matter of fact and not arising from the construction of any clause in the deed, may be rebutted by oral testimony."

In the case of *Peacock v. Monk*, 1 Ves. 128, taken from note in *Phillips on Evidence*, Vol. 1, p. 550, Lord Hardwick makes the same distinction. A bill in that case was filed claiming the benefit of a trust under a deed, and the point was whether the plaintiff could prove a valuable consideration, as no consideration was expressed in the deed. Lord Hardwick held that proof ought to be received.

In the case of *Clark, Adm'r, v. Deshon*, 12 Cush. 589, it was objected that parol evidence was admitted to prove an additional consideration for the bill of sale where the bill of sale itself expressed a certain sum as a consideration. The court

say: "Another distinct ground for the admission of this evidence is that where the conveyance of property has been made by deed expressing on the face of it a consideration, it may be shown by parol evidence that an additional consideration, or that another and distinct consideration in fact existed." Citing *Wallace v. Wallace*, 4 Mass. 135, and *Brewer v. Hurd*, 22 Pick. 376.

GARNETT, J. About March 1, 1888, Catharina Muhlke was the owner of lots 42 and 43 in Uhlich & Muhlke's addition to Chicago, and at that time she sold lot 43 to appellant. On March 15, 1888, an agreement for a party wall between the two lots was made by appellant and said Muhlke, by which he was permitted to make the west twenty-six feet and four inches of the south wall of the house he proposed to erect a party wall, to rest equally on lots 42 and 43, and it was to remain a party wall forever. The agreement provided that Mrs. Muhlke, her heirs and assigns, should have the right to use the wall for any building erected on lot 42, after paying to Grimley one-half the value of the wall, or so much thereof as should be so used, and the cost price at the time of such using was to be regarded as the value. It was also agreed that the wall should not be cut into in any manner liable to endanger its stability, and that if either party thereafter wished to build a barn or extend the party wall, it should be done in the same manner as therein before specified, and the other party could have the privilege of using the same by paying one-half the cost of it, and that the agreement should be perpetual and a covenant running with the land.

In constructing his house, Grimley built the party wall in the manner stipulated. He then built a barn at the rear of lot 43, supposing he had placed the south wall thereof equally on the two lots. Afterward, and prior to March, 1889, Mrs. Muhlke conveyed lot 42 to appellee, who proposed to erect a much deeper building than Grimley's, using the party wall erected by him as far as it extended, and then to continue the same to the necessary length. About that time appellee discovered that Grimley had built the south wall of his barn

Grimley v. Davidson.

entirely upon her lot; and to settle that difficulty, as well as to adjust the rights of the parties in reference to the party wall so built by Grimley and the extension projected by appellee, a new contract, dated March 6, 1889, was made between appellee, as party of the first part, and appellant, as party of the second part, which, after reciting the fact of the ownership of lot 42 by appellee and of lot 43 by appellant, the making of the original party wall contract, the building of the party wall for the houses by Grimley, and the building of the south wall of his barn entirely on lot 42, proceeded as follows: "And whereas the said party of the first part is about to erect a front building and barn on said lot forty-two (42), it is hereby mutually agreed to, by and between said two parties, their heirs, executors, and administrators and assigns, that said party of the first part shall pay to the party of the second part the sum of one hundred and fifty dollars (\$150), being the full moiety or one-half of the cost of party wall and barn wall, the receipt whereof is hereby acknowledged by the party of the second part, and the said party of the first part shall build the extension of the front party wall as provided for in party wall contract; but the said party of the second part, his heirs, etc., shall never have the right to use said wall, contrary to the provisions of said party wall contract, dated March 15, A. D. 1888, nor shall he (the party of the second part, etc.) have the right to obstruct the light for any window said party of the first part shall build into said wall. It is further agreed between said parties that the barn foundations will be lowered so as to conform to plans, and be built in such a manner as most convenient to mechanics, said William H. Grimley allowing proper access and assistance in rebuilding. It is further agreed that said party shall have the privilege to entirely rebuild the barn wall as far as main building shall extend.

"PEARL M. DAVIDSON,

"Per M. Davidson.

"WILLIAM H. GRIMLEY."

Soon after the execution of that contract appellee proceeded to erect a building on lot 42 and to build an extension of the

party wall between the houses. The plans and specifications for her building contemplated openings for windows in the extension of the party wall, and she does not deny that it was her intention to construct such openings in the extension and to place windows therein. To prevent such action on her part, Grimley filed the bill in this case, which was dismissed on final hearing by the Circuit Court, from which order Grimley brings this appeal.

It is argued for appellant that there was no consideration for any of the agreements of Grimley set forth in the paper of March 6th. That this is a mistaken interpretation is entirely free from doubt. The barn wall was built upon appellee's lot, and she was not legally liable to pay for any part of it, but might have appropriated the whole of it as her own property. Payment to Grimley for what was in law her own, constitutes a valuable consideration for his undertakings. Then appellant claims that there is nothing in the contract of March 6th, granting to appellee the privilege of cutting openings and building windows in the extension of the party wall. If by this it is meant that there are no words of express grant, it must be acknowledged. The paper is inartificially drawn, but it is not difficult to discover, in the words used by the parties, an intention to allow appellee to make such windows, and to preserve the benefit thereof to her free from any obstruction of the light by appellant. Any other conclusion can only be reached by refinement which we can not approve.

It is seldom that the whole of the purpose of the parties to a contract is so clearly expressed as to need no aid from inference. When, however, the express words fairly and legitimately require an inference as to their intention, the intention thus inferred is just as truly a part of the contract as the clearly expressed undertaking. *Ames v. Moir*, 27 Ill. App. 88.

Both points were correctly ruled by the chancellor, and the decree is affirmed.

Decree affirmed.

Campau v. Bemis.

DANIEL J. CAMPAU

v.

HENRY V. BEMIS.

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44 216

Trover — Paintings — Demand — Conversion — Estoppel — Evidence — Instructions.

1. An instruction should not state that which it is the duty of the jury to find from the evidence.

2. A defendant relying upon the refusal of the trial court to instruct the jury at the close of the plaintiff's case to find in his behalf as erroneous, should not enter upon his defense. Having done so, the verdict must be tested by the entire evidence in the case.

3. The delivery of a list of office fixtures to the purchaser of stock in a corporation, subsequent to the sale, will not estop the seller, in the absence of an understanding upon the subject, from recovering articles named therein upon the ground that they were not included in the sale, such list forming no inducement for the purchase.

4. In an action of trover brought to recover the value of certain paintings, this court holds that they were the property of the plaintiff, that the same were demanded by him, and that defendant's orders to an employe to retain them amounted to a conversion.

[Opinion filed December 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Messrs. DUPEE, JUDAH & WILLARD, for appellant.

" A demand and refusal is only evidence of a conversion; before it is entitled to any weight whatever, it must be proved that the party making the refusal had it in his power to deliver up the article demanded. And a mere qualified refusal, if the grounds for not delivering the property are reasonable, will not amount to a conversion; as where the party making the refusal is ignorant who is the real owner of the property, and requires to be satisfied respecting the ownership, or, where a servant has received the custody of property from his master, and requires that his master be applied

to before he delivers it up." 3 Phillips on Ev., *541; Alexander v. Southey, 5 Barnewall & Alderson, 247.

In the above case, goods, the property of plaintiff, had been, by the servants of an insurance company, carried to a warehouse of which the defendant, a servant of the company, kept the keys. The defendant, on being applied to by plaintiff to deliver up the property, refused to do so without an order from the company. Held, that this was not such a refusal as amounted to a conversion.

Abbott, C. J., said: "The question is, whether the refusal of the servant to deliver the goods in question amounts to a conversion of the property. This, therefore, is the case of a conversion arising by construction of law. I think the refusal in this case, not being an absolute refusal, was not sufficient evidence of a conversion, and that the learned judge was right in so considering it and in directing a verdict for defendants."

Holroyd, J., said: "If we were to hold this refusal to be a conversion, it would go this length, that if a person went to call at a gentleman's house, and asked his servant to deliver goods to him, and the servant were to refuse to do so unless a previous application was made to his master, it would amount to a conversion on the part of the servant. In this case the goods came into the defendant's possession lawfully, and the refusal is only until an order is obtained from the defendant's employers. The case of Mires v. Soleboy, 2 Modern, 242, is in point. There the servant refused to deliver back some sheep which were on his master's land, and it was held to be no conversion on his part."

In 2 Greenleaf's Ev., paragraphs 644-5, the rule is stated as follows: "Section 644: Where the circumstances do not of themselves amount to an actual conversion, it will be incumbent on the plaintiff to give evidence of a demand and refusal at any day prior to the commencement of the action, and also to show that the defendant at the time of the demand had it in his power to give up the goods. But the demand and refusal are only evidence of a prior conversion, not in itself conclusive, but liable to be explained and rebutted by evidence to the contrary."

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"Section 646: Even an absolute refusal is not always evidence of conversion. Thus, where the plaintiff's goods were attached in the hands of his bailee, who on that account refused to deliver them up, it was held no conversion. So it is where the possessor of goods refuses to deliver them up until some ownership is shown in the claimant; or until some other condition lawfully imposed by him is complied with; as where a servant having the custody of goods apparently his master's, refuses to deliver them without an order from his master."

In the case of *Carroll v. Mix*, 51 Barber, 212, it is held: "Where a bailee of goods absolutely refuses to deliver them to the owner on demand; or denies his right to them; or assumes to himself be owner; or interposes an unreasonable objection to deliver them; or exhibits bad faith in regard to the transaction, a conversion of the property may be inferred. But where the defendant received goods from B, without knowing who was the owner, but having every reason to suppose B to be the owner, and, on demand being made by a third person claiming to be the owner, did not set up any claim to them, or dispute the claimant's right, but stated in substance, that he did not know the claimant was the owner; that the property was left by B, and that he desired the order of his father, or B, before delivering the same; or an opportunity to confer with his father in regard thereto: Held, that this was not such a refusal as amounted to a conversion of the goods."

In *Monnot v. Ibert*, 33 Barb. 24, Justice Emott remarks: "It is true the authorities require that the refusal should be absolute, and not evasive. But this means that it should not be a mere excuse or apology for not complying immediately, as when the demand is made by an agent, and the other party wishes to verify his authority before complying, or of an agent who must consult his principal. If such excuses are made in good faith, they will not amount to a refusal for which trover will lie. There must be an absolute denial of the plaintiff's right, or the qualifications must be unreasonable or made in bad faith." See, also, *Holbrook v. Wight*, 24 Wend. 169. Cowen, J., at page 177, remarks: "So of any

reasonable excuse made in good faith at the time, the goods being evidently kept with a view to deliver them to the true owner. It is then the business of the plaintiff to obviate the objection as far as may be reasonably required." The case at bar is clearly within the principle established by the authorities cited, and the rule thus adopted is reasonable and just, and the plaintiff should have acted upon it, instead of exhibiting such inexcusable haste in commencing an action against an innocent party.

To constitute a refusal upon demand evidence of conversion, it must be unconditional, or with a condition which the party had no right to impose, and not a reasonable excuse. *Kinne v. Dale*, 14 Ill. App. 311.

The demand in this case was not for the pictures, but that Walker box and ship them to plaintiff, and was a demand which plaintiff had no right to make, and to which Walker nor the company were under any obligations to concede. An absolute refusal to comply with it would have been no evidence of conversion.

Messrs. Dow & BURNHAM, for appellee.

Simple refusal to deliver goods rightfully in defendant's possession would not be an act of trespass, but such refusal might furnish ample grounds to sustain an action of replevin for detention, or trover for their value. *Isaac v. Clark*, 2 Bulst. 310, sometimes cited as *Thimblethorp* case.

An unlawful taking or control of the goods of another is sufficient to sustain an allegation of taking, without proof of an actual forcible dispossession of plaintiff. *Haythorn v. Rushforth*, 19 N. J. L. 160; *Stewart v. Well*, 6 Barb. 80; *Neff v. Thompson*, 8 Barb. 215; *Wheeler v. McFarland*, 10 Wend. 322; *Barrett v. Warren*, 3 Hill (N. Y.), 349.

Demand is necessary in order to afford an opportunity to defendant to restore goods to rightful owner or to make satisfaction so that he should not be subjected to costs of suit. *Pringle v. Phillips*, 5 Sandf (N. Y.), 157; *Pierce v. VanDyke*, 6 Hill, 613. In this case appellant is not entitled to a demand.

Where a machine was delivered to one through mistake of

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expressman, and he encouraged delivery and afterward made repairs upon it, the taking was wrongful and no demand was necessary. *Purvis v. Moltz*, 5 Rob. (N. Y.), 658.

When action is for wrongful taking, proof of an actual or constructive wrongful taking by defendant will be sufficient without proof of demand. *Stillman v. Squire*, 1 Denio, 328; *Oleson v. Merrill*, 20 Wis. 462; *Cummings v. Vorce*, 3 Hill, 282; *Lewis v. Masters*, 8 Blackf. 245.

The law will presume from proof of wrongful taking, that the goods continue in the taker's possession, and that he remains of the same purpose of mind in which he committed the wrong. *Paul v. Luttrell*, 1 Col. 320; *Johnson v. Howe*, 2 Gilm. 342.

When defendant has notice of plaintiff's rights any act done for the purpose of defeating them will amount to a conversion. *Kennet v. Robinson*, 2 J. J. Marsh. (Ky.) 84, holds an assumption of ownership sufficient.

Actual possession of the property, or the exercise of some control or dominion over it or interference with it by defendant, may amount to a conversion. *Presley v. Powers*, 82 Ill. 125.

When the defendant sets up a claim of ownership, this claim is inconsistent with any hypothesis that he would surrender them on demand and will obviate necessity of proving demand. *Seaver v. Dingley*, 4 Greenleaf (Me.), 207; *Smith v. McLane*, 24 Iowa, 322; *Newell v. Newell*, 34 Miss. 485; *Cranz v. Kroger*, 22 Ill. 74; *Perkins v. Barnes*, 3 Nev. 557; *Pierce v. Van Dyke*, 6 Hill, 613; *Homan v. Laboo*, 1 Neb. 207.

Defendant's pleas of *non cepit* and *non detinet* concede right of property in plaintiff. *VanNamee v. Bradley*, 69 Ill. 299; *McGavock v. Chamberlin*, 20 Ill. 219; *Yott v. People*, 91 Ill. 11.

If a party refuse to deliver goods to the owner on the ground that they belong to himself, or that they belong to a third person, this refusal amounts to a conversion. 2 Will. Saund. 47 f, notes; *Baldwin v. Cole*, 6 Mod. R. 212; *Wilson et al. v. Anderton*, 1 Barn. & Adol. 450; *Coffin v. Anderson*, 4 Blackf. R. 406-7.

MORAN, J. This was an action of trover to recover the value of three oil paintings, portraits respectively of the famous horses "St. Julien," "Bonesetter" and "Little Brown Jug." There was a verdict for the plaintiff for \$1,500, and this appeal is prosecuted from the judgment entered thereon.

For the appellant it is contended, that the pictures did not belong to appellee, but to the Chicago Horseman Newspaper Company, a corporation of which he was president. It is very clear from the evidence, that the pictures were appellee's at the time they were placed by him in the office of "The Horseman" company, and there is no evidence whatever tending to show that he ever sold them to said company. He was the chief stockholder and president of "The Horseman" at the time he hung the pictures in the office, and they remained in the office after he sold out his stock in the company to appellant.

At the time of the said sale of stock, which was made in Chicago, appellant asked for an inventory and appellee telegraphed to New York for an inventory of the articles there, and one was sent in which the oil paintings in question were included, which list or inventory was afterward handed by appellee to appellant; but it satisfactorily appears from the evidence that such list was not given to appellant till after the stock was transferred and paid for, and that the supposed inference that might be drawn from such list, that the paintings were part of the assets of the corporation, formed no inducement to appellant to purchase, and therefore the delivery of such list constituted no estoppel as against appellee.

The finding of the jury, that the pictures were the property of appellee is, in our opinion, clearly supported by the evidence.

It is strenuously contended, however, that there is no evidence of a demand upon appellant for the property, and no evidence of an actual conversion by him. The evidence is in substance that appellee, when in the New York office of "The Horseman" company, requested one Walker, who was the manager and editor of the newspaper, and who was in charge of

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the office, to send the pictures to him in Chicago; to have them boxed up and sent; and Walker promised that he would have them boxed up and sent the next day. The next day appellant was in the office of the company, and he has related in his evidence what occurred. "Walker, the agent, said to me, 'By the way, Mr. Bemis was in here yesterday or the day before, and asked me to send him those three oil paintings, and he also requested me to send two other crayon pictures; but I reminded him some time ago he had given me those crayons, and he said, "Well, that is all right, but send those paintings." What shall I do about them?' I replied that he should not send any property which belonged to the company without an order from its executive officer, the president."

He further testified, speaking of the New York office: "The desks there belong to the company, and the carpet and decorations and fixtures and furniture. I claim that these three pictures belong to the company. They always considered it so. That is the reason why I said to Mr. Walker what I did say. I thought it my duty to retain those pictures for the benefit of the company."

This evidence clearly shows that appellant, in directing Walker not to send the pictures, was in fact and intent exercising a dominion over them in exclusion of appellee's right and inconsistent with appellee's ownership of them.

"The action of trover being founded on a conjoint right of property and possession, any act of the defendant which negatives or is inconsistent with such right amounts in law to a conversion." *Leptrot v. Homes*, 1 Kelly (Ga.) 381.

A party may be guilty of a conversion by dealing with or claiming property in goods as his own, or even by asserting the right of another over them. If appellant knew that appellee claimed the pictures, and he intended to prevent his obtaining possession of them by directing that they should not be sent to him, the reason for his order being that he regarded them as not appellee's property, but as the property of the company, whose rights he deemed it his duty to assert, then his direction not to deliver them would be evidence of a conversion.

"A wrongful intent is not an essential element of the conversion. It is enough in this action, that the rightful owner has been deprived of his property by some unauthorized act of another, assuming dominion or control over it." *Boyce v. Brockway*, 31 N. Y. 490.

"A very slight agency or interference will make one liable in trover." *Farrar v. Chauffetete*, 5 Denio, 527; see *Follett v. Edwards*, 30 Ill. App. 386, and cases there cited.

Appellant argues that at the close of the plaintiff's case there was no evidence before the jury to prove conversion, and the instruction then requested by appellant, that the jury should find for the defendant, should have been given by the court. If the appellant desired to rely on that refusal as error he should have stood upon it, and should not have entered upon his defense. The verdict must be tested by the entire evidence in the case, and so tested, the finding that there was a conversion, is, as we have already seen, supported.

The other instruction, the refusal to give which is assigned as error, assumes to state to the jury the effect of appellant's direction to Walker, instead of leaving that question to the jury to find, and was properly refused.

There is no error, and the judgment of the Circuit Court must therefore be affirmed.

Judgment affirmed.

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44	194

85	44
102	*818

GREGORY VIGEANT

v.

D. B. SCULLY.

Master and Servant—Architect—Negligence Of—Failure to Properly Superintend—Defective Wall—Res Adjudicata—Damages.

1. The release of one of two joint wrongdoers, or the receiving of satisfaction from one of them, is a release or satisfaction as to both.

2. A party injured by the joint wrong of several persons may elect to treat it as the separate act of each, but there can be but one satisfaction therefor.

Vigeant v. Scully.

3. In an action for damages alleged to have arisen through the negligence of an architect in failing to properly supervise the construction of certain buildings, this court holds that the verdict for the plaintiff in an action heretofore brought by the contractor whose work was claimed to have been defective, to recover from the plaintiff an amount alleged to be due, precludes recovery by the latter in the case presented.

[Opinion filed December 2, 1889.]

IN ERROR to the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

MESSRS. YOUNG & MAKEEL, for plaintiff in error.

MR. ARNOLD TRIPP, for defendant in error.

GARNETT, J. This case, under the same title, was before this court at a former term, the opinion disposing of the points then raised being in 20 Ill. App. 437. A new trial having occurred in the Superior Court, resulting in a judgment against Vigeant, the defendant, the record is again brought here for review. The action is in case to recover damages caused by the neglect of Vigeant, an architect, to properly superintend the erection of certain buildings for Scully. One Kaiser was employed by Scully to execute the mason work in the buildings, and it is not disputed that by the terms of his employment the defendant was to superintend the work of Kaiser, or that it was his duty to exercise reasonable care and skill in that respect. It appears by the evidence that shortly after the completion of the work, the dwarf walls erected by Kaiser began to show indications of sinking and giving way, and the trouble continued until the buildings were damaged to a large amount. Whether the damages were caused by imperfect construction of the dwarf walls is a point upon which there was much conflicting evidence; but Scully claimed that the dwarf walls were inherently defective, and were allowed to be so constructed through the negligence of the defendant. Finding the buildings were settling and cracking, the defendant refused to give Kaiser a final certificate of com-

pliance with his contract, and thereupon Kaiser brought suit against Scully to recover the balance claimed to be due him for work and materials under his contract. On a trial of that case in the County Court, a verdict was rendered in Kaiser's favor, judgment was entered on the verdict and Scully paid the amount thereof to Kaiser.

That this was *res adjudicata* between Scully and Kaiser as to the alleged neglect of Kaiser is beyond question. There is no evidence tending to show that Kaiser's recovery was based upon anything short of a full performance of his contract, and we must therefore presume that he established, to the satisfaction of the jury, a complete performance. If Scully should now sue Kaiser for damages, caused by his neglect in building the dwarf walls, the former judgment would be interposed as a bar. "Whenever a plaintiff seeks to recover for some matter which he might have presented in a former action against himself as the foundation for a claim in the nature of a cross-action for damages, the test of his right to recover in the second action, after having waived his cross-claim in the first, is, can all the facts necessary to support the judgment rendered against him exist at the same time with the facts necessary to support the cross-claim sought to be enforced in the second suit? But if, in order to recover in the first action, the plaintiff must have shown the falsity of the allegations made by the defendants in the second suit, then the former judgment is a bar. Thus, if the plaintiff sue upon a contract to do certain work upon his part, alleging a full performance, and claiming the price stipulated by the contract, his recovery depends upon a full compliance with his agreement, and estops the defendant from afterward contending that he sustained any damages from a non-fulfillment of the contract." Freeman on Judgments, Sec. 282; 1 Herman on Estoppel, Sec. 231; Davis v. Tallcot, 12 N. Y. 184; Blair v. Bartlett, 75 N. Y. 150.

The point is now urged by the plaintiff in error, that as the damages for which the plaintiff seeks to hold him liable are precisely the same for which Kaiser was liable (if they were caused as alleged by plaintiff), the judgment in the County

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Court is a bar to this action. If the injury had been caused by the joint negligence of Vigeant and Kaiser, there would be no difficulty whatever in yielding this point, because it is established law that the release of one of two joint wrongdoers, or satisfaction received from one, is a release or satisfaction as to all. Cooley on Torts, 138, 139; Turner v. Hitchcock, 20 Iowa, 310; Gilpatrick v. Hunter, 24 Me. 18; Ellis v. Bitzer, 2 Ohio, 89; Metz v. Soule, 40 Iowa, 230; Ayer v. Ashmead, 31 Conn. 447; Karr v. Barstow, 24 Ill. 580; Bronson v. Fitzhugh, 1 Hill, 185.

The case last named gives as the reason of the rule, that "after satisfaction, although it moved from only one of the tort feors, no foundation remains for an action against any one. A sufficient atonement having been made for the trespass, the whole matter is at an end. It is as though the wrong had never been done."

In Gilpatrick v. Hunter, the court said: "The difficulty in maintaining the suit against the other is, that the law considers that the one who has paid for the injury occasioned by him, and has been discharged, committed the whole trespass and has occasioned the whole injury, and that he has therefore satisfied the plaintiff for the whole injury which he received."

It is also true that the party injured by the joint wrong of several persons, may elect to treat it as the separate act of each. But, "if the plaintiff elects to fix a several liability upon them, yet he can have but one satisfaction, for the reason that the injury is single and indivisible, and can not be apportioned into parts." Turner v. Hitchcock, *supra*. Assuming that these authorities give true expression to the law, they at least furnish a strong analogy for application to the case before us. Here is a wrong for which two persons are severally, and not jointly, amenable. One of them makes complete reparation. Can the injured party demand anything more from the other tort feor? The foundation for such a demand would seem to be removed. One atonement is all the law exacts. That having been made, "it is as though the wrong had never been done." Those who have acted separately in committing the injury, can be in no worse situa-

tion than they who, having acted jointly, are, by the election of the injured person, made separate trespassers. This analogy is distinctly recognized by the reasoning of the court in *Newman v. Fowler*, 37 N. J. 89. That was a suit by the owner of certain premises against his architect, to recover damages for defective workmanship and materials permitted by the defendant in the building which the plaintiff employed him to oversee. The plaintiff retained in his hands a part of the price agreed to be paid for the construction of the house, which the defendant insisted upon as a satisfaction, at least to that extent of the damages. The court said: "It must be admitted that, in a suit by the contractor for the residue of the contract price now withheld by the plaintiff, it would be competent to show, in diminution of the contract price, that the building has not been built in the manner stipulated. * * And if such action had been brought, and such defense had been interposed, and it had prevailed, it seems to me that the present action would have been barred. The reason is that, although the person wronged by the negligence of two persons can bring his action against both, or either, still he can not require a double satisfaction."

The same principle is recognized in 1 *Herman on Estoppel*, Sec. 152; *Crow v. Bowlby*, 68 Ill. 23; *Kinnersley v. Orpe*, 2 *Douglas*, 517; *Emery v. Fowler*, 39 Me. 326; *Green v. Clarke*, 12 N. Y. 343; *L. S. & M. S. R. R. Co. v. Goldberg*, 2 Ill. App. 228.

If the plaintiff in this case was entitled to any damages, it was his duty to insist upon them in the suit brought by Kaiser. The adjudication in that case has the same effect as a payment and satisfaction made by Kaiser to Scully. The benefit of the principle here announced was sought by appellant in the fifth instruction requested in his behalf, but the court erroneously introduced therein a material modification that destroyed the effect which might have been anticipated from the instruction as requested. The judgment is reversed and the case remanded.

Reversed and remanded.

Walker v. Gibson.

JAMES H. WALKER AND HENRY L. HERTZ, CORONER,

V.

MILROY H. GIBSON ET AL.

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51	597

Injunctions—Insolvency—Executions—Goods in Sheriff's Hands—Replevin—Writ of Execution by Coroner—Credit—Fraudulent Representations—Receiver—Jurisdiction.

1. Upon a bill filed praying for an injunction to restrain the coroner from executing a writ of replevin, under which it was sought to obtain possession of certain goods, and for the appointment of a receiver to take charge of the property and assets of a firm named, this court holds that the party in whose behalf said writ was issued, was a necessary party defendant to the bill in question, it being apparent that the object thereof was to prevent the recovery of the goods referred to in said writ.

2. In the case presented, it is *held*: That while the plaintiff in the replevin suit was not a party to the proceedings involving the appointment of the receiver, and that the order making such appointment had no application to him the coroner was such party, and the joinder of both in the appeal did not invalidate the same as to the latter, and that the order in question must be reversed, there being no allegations in the bill authorizing, as against the coroner, such appointment.

[Opinion filed December 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding.

On June 27, 1889, a bill was filed in the Circuit Court by appellee Gibson, setting out that he had been engaged with a partner named Hugh McCormick in the dry goods business in the city of Chicago; that on the 17th of June, 1889, said firm were in the possession of a certain stock of dry goods, which, with some debts due the firm, made the assets of the value of \$10,000 to \$12,000; that said firm was indebted to various parties to an amount exceeding the value of said assets, and that on said day said firm was insolvent; that on said June 17th some four judgments were recovered against said firm, and executions were issued on said judgments and delivered

to the sheriff and by him levied upon the said stock of goods: that on June 18th a fifth judgment was recovered against said firm and the execution issued thereon delivered to the sheriff, so that said execution became a lien on said goods subject to the prior lien of the said four executions; that said stock of goods are in the possession of the sheriff, and are in good and merchantable condition; that complainant is advised that divers other proceedings have been taken by other creditors of said firm for the purpose of acquiring liens on said goods. Further shows that on June 20, 1889, after the levy of said executions, one James H. Walker filed in the Supreme Court a plaint in replevin wherein it is alleged that he is entitled to the immediate possession of certain specified articles in said plaint named, together with all other dry goods, notions, etc., belonging to said James H. Walker, then located in the said store of said firm, and said Walker sued out of said court his writ of replevin directed to the coroner, and delivered the same to said coroner to execute, and said Walker now claims and is attempting to take possession of nearly all of the goods, chattels and property so contained in such store, under and by virtue of said writ; that no considerable number of articles named in said writ of replevin remain in said stock of goods in the amounts and quantities described in said writ, but the stock of goods levied upon by the sheriff consists largely of broken packages and pieces of goods that will answer to the description of goods described in said writ; that said coroner proposes to execute said writ of replevin, and said sheriff threatens to allow said coroner in the execution of the said writ to enter the said store with clerks of said James H. Walker and submit the goods to the inspection of said clerks, and said coroner will levy said writ on such articles as said clerks shall say were purchased of said Walker, without reference to the fact whether such goods are the articles of property described in said replevin writ.

That portions of said stock of goods were bought by said firm from said Walker and other portions of said stock were purchased from others. That Walker claims to be entitled to the possession of the property in question, on the ground that a member of said firm, for the purpose of obtaining goods

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for said firm on credit, made false and fraudulent representations, which now justify him, said Walker, in rescinding such sales and reclaiming the goods thus sold, which pretense on the part of said Walker is false and untrue; but Walker may obtain undue and illegal possession of the said goods through said writ of replevin. That goods now in the store of said firm purchased from said Walker have been partially paid for, and Walker has a note of the firm given in part payment for said goods which he has not offered to return. That if said Walker is permitted to take possession of said goods on said writ, he will mingle them with other goods and dispose of them, and that complainant will be deprived of an opportunity to inspect or identify the goods. Charges that the said action and proceedings on the part of Walker are for the purpose of hindering and delaying creditors of said firm, and so entangling the title, possession and identity of the property as to prevent the same from being available to liquidate the indebtedness of said firm; that Walker has not offered to credit said goods on any indebtedness existing from said firm to said Walker, and that if he shall obtain possession of the property said firm will be deprived of the benefit of having said goods applied to the payment of said judgment. Then follow allegations that the partnership should be dissolved, and the affairs wound up. All the judgment creditors are made parties defendant to the bill, as is also the sheriff and Hertz, the coroner, and an injunction is prayed for, to restrain the coroner from executing the said writ of replevin, and the appointment of a receiver is prayed to take possession of the property and assets of the firm, to be managed and disposed of under the direction of the court.

On June 27th, a receiver was appointed and an order entered, directing that all the assets of said firm in the hands of the complainants or defendants should be turned over to the receiver.

On July 27th, James H. Walker and H. L. Hertz prayed for an appeal from order appointing a receiver, and the appeal was allowed on a bond of \$500, but a motion to stay the sale of the property by the receiver was denied.

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Walker v. Gibson.

Messrs. TRUMBULL, WILLITS, ROBBINS & TRUMBULL, for appellants.

Messrs. FREDERICK W. PACKARD, PERRY A. HULL and GEORGE S. HOUSE, for appellees.

MORAN, J. It is very apparent from an inspection of the bill, the substance of which is set out in the statement of facts, that James H. Walker was a necessary party, and the court should have entered no order on the bill which would affect the interests or rights of said Walker without requiring that he be made a party and given proper notice. The purpose of having a receiver, so far as such purpose is disclosed by the bill, was manifestly to obstruct said Walker in obtaining possession of goods claimed by him, through the regular remedy provided by law to accomplish that end. To prevent his obtaining his property by the appointment of a receiver, was the same as depriving him of it, and it was indispensable that he should be made a party that he might resist such appointment. *Baker v. Backus*, 32 Ill. 96.

The order of the court appointing a receiver is not indeed attempted to be defended here by the appellees, but they seek to avoid a review of the order by the suggestion that this court has obtained no jurisdiction of the matter under the appeal as perfected. Walker, it is said, was not a party to the suit, and hence had no right of appeal, and has no standing here on the appeal, and as the order granting the appeal allowed it to Hertz and Walker jointly, Hertz alone has no appeal here. As Walker was not a party to the suit the order was not against him. But it was against Hertz, and the fact that Walker joined in the appeal does not invalidate the appeal as to Hertz. The order of the court allowing the appeal on condition that Hertz and Walker should execute the bonds has been strictly complied with, and it is not suggested that there is any misrecital in the bond of the order appealed from. *Willenborg v. Murphy*, 40 Ill. 46.

Counsel contend that the above case is overruled in *Hillman v. Beale*, 115 Ill. 355, but we understand that the principle here applied is not only not overruled by said last mentioned

case, but that it is stated as the true point of the former decision.

The case is here, then, as the appeal of Hertz, and the order appointing the receiver must be reversed, as there is not an allegation in the bill which authorizes the appointment of a receiver as against him. It was his duty as an officer of the law, to execute the writ and deliver the property described in it if found by him, to the plaintiff in the replevin suit.

Every reason which exists to forbid the appointment of the receiver as against Walker, who was not a party, save the single one of notice, is also a reason why no receiver should be appointed under the allegations of this bill to prevent Hertz, as an officer, from executing his writ. The bill taken as a whole, furnishes no warrant or authority for the appointment of a receiver as against the judgment creditors or any person claiming a legal title to the goods as against the members of the firm or the sheriff. The order appointing the receiver will be reversed.

Order reversed.

GORDON M. RICHARDSON

V.

ADOLPH ASCHER ET AL., ASSIGNEES.

Insolvency—Attachment—Voluntary Assignment—Prior Levy—Judgment—Verdict.

1. Upon a contention as to whether a levy under a writ of attachment was made before the filing for record of a certain deed of assignment, this court declines, in view of the evidence, to interfere with the judgment of the trial court, denying the petition for priority.

2. In such cases the law gives the same respect to the judgment of the court as to a verdict of a jury.

[Opinion filed December 2, 1889.]

APPEAL from the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

Mr. E. A. ABORN, for appellant.

Messrs. KRAUS, MAYER & STEIN, for appellees.

GARNETT, J. This is a contest between appellant, an attachment creditor of Simon Richter, and appellees, to whom Richter made a voluntary assignment for the benefit of his creditors, on April 10, 1889. Appellant's writ of attachment was sued out the same day the assignment was made, but prior to both the stock of goods belonging to Richter had been levied upon by the sheriff of Cook County, under an attachment writ issued from the Superior Court of Cook County, in favor of Moore Brothers, and at the same time the goods were subject to a lien in favor of one Miller, under an execution then in the hands of the sheriff. Finding his stock of goods in possession of the sheriff, by virtue of the attachment in favor of Moore Brothers, Richter caused an assignment to appellees to be prepared, executed the same before eleven o'clock in the forenoon of April 10th, and it was filed for record both in the recorder's office and in the office of the clerk of the County Court of Cook County at twelve o'clock at noon of that day. Immediately after the assignment was executed, Richter and Ascher called at the sheriff's office and gave notice of the assignment, telling the deputy sheriff that the assignee wanted possession of the stock of goods. Appellant claims that, before the sheriff was notified of the assignment, the constable, in whose hands the writ of attachment was placed for the purpose of levying, informed the deputy sheriff that he had the writ, and wanted to make a levy thereunder on the stock of goods. The constable did indorse upon the writ of attachment a levy upon the stock, and stated in his return that the levy was made in the forenoon at eleven o'clock and twenty-five minutes. If the statement in the constable's return of his levy, as to the time it was so made, is evidence of the exact time of the levy, it is not conclusive. There was other evidence strongly tending to prove that the deputy sheriff did not see the constable that day until after twelve o'clock at noon, and it is not pretended that the sheriff

Kitson v. Ellinger.

himself was notified of appellant's attachment. If the deputy sheriff was not notified of appellant's attachment until after twelve o'clock at noon, it was clearly too late to give appellant a lien prior to the title of the assignees. The County Court heard the evidence, saw the witnesses, and, believing the evidence in favor of the assignees, dismissed the appellant's petition for priority. In such cases the law gives the same respect to the judgment of the court as to a verdict of a jury. *Wood v. Price*, 46 Ill. 436. The judgment is affirmed.
Judgment affirmed.

SAMUEL KITSON

v.

ALBERT ELLINGER.

35	55
44	186
35	56
55	225

Exemptions—Capias—Imprisonment—Petition for Release—Act of 1872—Evidence—Pleading—Execution—Irregularity in Issuance of—Waiver.

1. A verdict and judgment based upon a count in a declaration setting forth that the defendant purchased certain goods, "falsely pretending that he wished to buy on credit and pay for the goods, when in fact he intended not to pay for them," will not warrant the issuance of a *ca. sa.* against the body of the said defendant.

2. It is admissible in a case of this character for the defendant to show, that on the trial of the case in which the *ca. sa.* issued, the evidence was such that the verdict was necessarily upon a given count.

3. If the point upon which a case turned in the trial court appears, this court may review it, although the mode in which it appears is out of the usual course.

[Opinion filed December 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Messrs. BISBEE, AHRENS & DECKER, for appellant.

Messrs. HOFHEIMER, ZEISLER & ROSENBERG, for appellee.

GARY, P. J. The appellant, being in custody under a *ca. sa.*, petitioned the County Court to be discharged from arrest by delivering up his property, pursuant to the provisions of the act of 1872, concerning insolvent debtors. The judgment upon which the *ca. sa.* issued was based upon a declaration containing three counts; the first alleging that he procured the sale of goods to himself upon credit by false representation as to his capital, and the other two that he procured such sale by falsely pretending that he wished to buy on credit and pay for the goods, when in fact he intended to not pay for them. That a verdict and judgment based upon either of the two last counts would not warrant the issuing of the *ca. sa.*, is decided in *People v. Healy*, 128 Ill. 9. Whether, in *Mahler v. Sinsheimer*, 20 Ill. App. 401, or in the case of this appellant, 30 Ill. App. 341, there is anything inconsistent with that position it is unnecessary to inquire, as this decision of the Supreme Court, besides being of paramount authority, is later than the cases in this court. But the case of *Mahler v. Sinsheimer*, 20 Ill. App. 401, does decide that where, as in the original case here, a recovery is had by a general verdict upon a declaration containing several counts, it is competent to show under which count the damages are assessed. And this is in accordance with general law. 1 Greenl. Ev., Sec. 532; 2 Taylor's Ev., Sec. 1701, p. 1453; 2 Ph. Ev., Cow. & H. Notes, 22 *et seq.*, side paging.

The petition of the appellant having been denied in the County Court, he appealed to the Circuit Court, and on a trial before a jury there, offered to show that the evidence in the case in which the judgment was obtained was not to the effect that the goods were obtained by any fraudulent representations.

This offer was rejected by the Circuit Court, and the appellant excepted. The record recites: "The court holds in this case that the petitioner is estopped from denying that malice is the gist of the action, because of the pleadings in the original suit;" to which also the appellant excepted. Perhaps such a declaration of the law, by the court, in a jury trial, if not followed by an instruction, could not be assigned as error,

City of Chicago v. Kenney.

even if not correct; but this was followed by a peremptory instruction against the appellant. There is no need, therefore, to call in aid the decisions in *Lowe v. Moss*, 12 Ill. 477, and *Ganche v. Mayer*, 27 Ill. 134, holding that if the point upon which a case turned below appears, the Appellate Court may review it, though the mode in which it appears is out of the usual course.

It was admissible for the appellant to show that on the trial of the case in which the *ca. sa.* issued, the evidence was such that the verdict was necessarily on one of the counts other than the first.

If that was shown, the appellant would be entitled to avail himself of the provisions of the insolvent act by giving up all his property. If there was any irregularity in issuing the execution in such case, while the County Court could not take cognizance of the irregularity, the appellant might waive it, submit to the execution, and obtain the relief the act gives "when malice is not the gist of the action." *Mahler v. Sinsheimer*, 20 Ill. App. 401.

The case having been tried in the Circuit Court upon the theory opposite to that here presented, the judgment is reversed and the cause remanded.

Reversed and remanded.

CITY OF CHICAGO

V.

WILLIAM KENNEY.

35	57
n93	271

Municipal Corporations—Ordinance—Chicago—Sec. 1024—Violation—Arrest upon View—Disorderly Conduct—City and Village Act, Secs. 84-278—Imprisonment for Debt—Penalty—Constitution—Justices—Jurisdiction—Action of Debt.

1. Proceedings under Secs. 84-278, of the city and village act, touching the arrest of persons disturbing the peace, or found violating a municipal ordinance, or the criminal law of the State, must be in the corporate name: such actions are of a civil nature in the form of debt, and are governed in all respects by the rule of procedure in civil cases.

2. An appeal to the Criminal Court in such cases brings the parties thereto before it, and its duty is to hear and determine the matter on its merits; such appeal is not to correct some error of law, but is to obtain a trial *de novo*, and the court has no power to determine whether the justice, before whom the case was originally brought, had jurisdiction of the subject matter until the evidence is heard.

3. Debts embraced in that clause of the State constitution touching imprisonment for debt, are those arising *ex contractu*, and do not include fines or penalties arising from violations of penal laws.

[Opinion filed December 2, 1889.]

APPEAL from the Criminal Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding.

This appeal is prosecuted to reverse the order of the Criminal Court of Cook County, dismissing the suit on motion.

Appellee was arrested and tried in the police court and fined for disorderly conduct. He regularly appealed the case to the Criminal Court. When the case was called in that court a motion was made to dismiss, on the ground that the record of the trial before the justice did not show that there was a written complaint, filed with the magistrate, before whom the case was tried, and so the magistrate had no jurisdiction. The following is the transcript of the police justice, which was filed in said case in the Criminal Court:

STATE OF ILLINOIS,)
CITY OF CHICAGO,) ss.
CHICAGO DISTRICT,)

Police Court, City of Chicago, Third District.

Before CHAS. J. WHITE, Esq., Justice of the Peace.

CITY OF CHICAGO,)
v.)
WILLIAM KENNY.)

Debt for penalty for disorderly conduct in violation of Section 1624 of the Revised Ordinances of the city of Chicago.

Arrested while committing the offense, by police officer James Kelly, Sergeant.

Case called for trial May 6, 1889; continued to May 8, 1889. The plaintiff and defendant present in court.

City of Chicago v. Kenney.

Defendant pleaded not guilty. Witnesses sworn and testified, and the court, after hearing all the evidence offered in the case, and being fully advised in the premises, finds the defendant guilty of disorderly conduct in violation of Section 1624 of the Revised Ordinances of the city of Chicago, and doth order that the said defendant be, and is hereby fined the sum of twenty dollars; wherefore, it is ordered, considered and adjudged by the court that the said plaintiff do have and recover of the said defendant the sum of \$20, together with its costs in this behalf expended to be taxed.

And it is further ordered by the court in case of default or refusal on the part of the said defendant to pay said fine and costs, that William Kenny, the said defendant, be committed to the house of correction, there be detained at hard labor until said fine, penalty and costs shall be fully paid and satisfied, provided such imprisonment shall not exceed the period of six months from the time of his commitment, and that execution issue therefor. Execution issued to police bailiff Wm. O'Brien, May 8, 1889.

Witnesses	}	Fine, \$20.
JAMES KELLY, Sergt.		
Desplaines Street	}	Costs, \$1.50.
Police Station.		

I certify that this transcript contains a full and perfect statement of all the proceedings before me in the above entitled case.

CHAS. J. WHITE,
Justice of the Peace.

HORACE BANYON,
Clerk Police Court.

Mr. JOHN A. MAY, for appellant.

There are three ways to begin proceeding against persons for the violation of city ordinances: First, by summons; second, by arrest upon warrant based upon sworn complaint; and third, by arresting the offender when the offense is committed in the presence of an officer, and bringing him before some justice of the peace to be dealt with "according to law." Sec. 340, Chap. 38, R. S.

In either of these cases the proceeding is a civil suit for debt: *Hoyer v. Town of Mascoutah*, 59 Ill. 137; *Town of Jacksonville v. Block*, 36 Ill. 507; *Graubner v. City of Jacksonville*, 50 Ill. 87; and as in any other civil suit brought before a justice of the peace, no written pleadings are necessary.

When suit is commenced by summons, the defendant is notified or served to appear before some justice of the peace named in the summons, on a certain day and at a stated time, on a "plea of debt" for the violation of a certain section of the municipal code. No written and sworn complaint or pleadings, specifically setting out the act complained of, is necessary, the only object being to give the defendant notice to appear so that he may offer in defense any evidence he may desire. The Legislature has deemed it wise, for the purpose of affording better protection to society, to prescribe the two other modes, arrest upon warrant and arrest when the offense is committed in the presence of an officer, by which the accused can be brought before the justice and dealt with according to law; but by prescribing these other modes in which the law may be put in motion, the Legislature does not in any way change the nature of the proceedings.

Jurisdiction over the subject-matter is conferred upon justices of the peace by express provision of the statute. Sec. 14, Chap. 79 R. S. And "when the jurisdiction is conferred upon justices of the peace in such cases, it follows that it must be held to authorize them to proceed as in other cases. It then results, as a part of their jurisdiction, that they may hear such cases without a complaint." *Ewbanks v. Town of Ashley*, 36 Ill. 177-180; *Town of Jacksonville v. Block*, 36 Ill. 507-509; *City of Alton v. Kirsch*, 68 Ill. 261-263.

In *Town of Jacksonville v. Block*, *supra*, the court says: "Such a penalty could not be recovered in any criminal proceeding. The statute conferring upon justices of the peace jurisdiction in such cases, must be held to authorize them to proceed as in other civil cases."

"The mode of recovering such penalties was not changed by authorizing justices of the peace to take cognizance of

cases for their recovery. No complaint was necessary to commence a suit, and it is of no importance what the complaint made contained, or whether it was or was not under oath."

In an action of debt for the violation of a city ordinance a sworn complaint is not necessary, except when a warrant is desired in the first instance, and then only because in prescribing this manner in which suits may be commenced, the statute expressly provides that a complaint first be filed. Sec. 279, Chap. 24, R. S.

The court was also in error in sustaining the motion of appellee to dismiss for want of jurisdiction in the justice of the peace, when his appeal had been perfected in the Criminal Court. Whatever irregularities there may have been before the justice were cured by the taking of the appeal, and no advantage could be taken of such irregularities in the Criminal Court.

This being a civil suit (*Hoyer et al. v. Town of Mascoutah*, 59 Ill. 137; *Town of Jacksonville v. Block*, 36 Ill. 509), the law governing other civil suits governs this case.

In *Town of Jacksonville v. Block*, *supra*, the court uses the following language: "No exception was allowable in the Circuit Court as to the form or service of the writ, nor to any proceedings before the justice. The duty of the court was to hear and determine the cause in a summary manner, according to its merits."

In the case of *Byars v. City of Mount Vernon*, 77 Ill. 467, the defendant was arrested upon a warrant charging him with the violation of a city ordinance. Objections were taken to the regularity of the proceedings before the justice, and in passing upon that case the court says: "No exceptions seem to have been taken to the affidavit before the police magistrate, and on the authority of *The Town of Jacksonville v. Block*, 36 Ill. 507, it would appear no objection to the sufficiency of the affidavit could be taken in the Circuit Court. It was the duty of the court to hear and determine the case in a summary manner, according to its merits." *Byars v. City of Mount Vernon*, *supra*.

The cases holding this to be the law in Illinois are numerous, and I respectfully call your attention to the following: *Village of Coulterville v. Gillen*, 72 Ill. 599; *City of Alton v. Kirsch*, 68 Ill. 261; *Harbaugh v. City of Monmouth*, 74 Ill. 367.

Messrs. JOHN F. GEETING and DWIGHT & KERN, for appellee.

The transcript does not show that the justice held his court in or that he was a justice of Cook county. *Brackett v. The State*, 2 Tyler, Vermont, 152-167; *Bisshoff v. Beverly*, 14 Vroom, 139.

"It is true that a person may be arrested without a warrant, in certain cases, but without a charge preferred as required by law, there is no case to be disposed of by the justice of the peace, and nothing to sustain a conviction in such a case." *Bingham v. The State*, 59 Miss. 529.

The same principle is maintained in *Wilcox v. Williamson*, 61 Miss. 311; *Prill v. McDonald*, 7 Kan. 450; *Tracy v. Williams*, 4 Conn. 107; *Sheldon v. Newton*, 3 Ohio State, 494-499; *O'Brien v. State*, 12 Ind. 369; *Burgis v. State*, 4 Ind. 126; *Com. v. Ward*, 4 Mass. 496; *Drake v. State*, 68 Ala. 512; *Clark v. New Brunswick*, 14 Vroom (N. J. Law Rep.), 175; *Mayor v. Murphy*, 11 Vroom (N. J. Law Rep.), 145; *Bill of Rights*, Secs. 6 and 9.

"When a prosecution originates upon complaint, one under oath or affirmation is implied. This may be fairly understood as a part of the technical meaning of the term whenever used in the statute." *Campbell v. Thompson*, 16 Me. 120.

"On appeal from a justice of the peace the Circuit Court has no greater jurisdiction than the justice had." *The People ex rel. McClintock v. Skinner*, 13 Ill. 287; *City of Alton v. Kirsch*, 68 Ill. 263; *Clayton v. Pir Dun*, 13 Johnson, 218; *Low v. Rice*, 8 Johnson, 409; *Klaise v. State*, 27 Wis. 462.

"A Circuit Court should dismiss a case on appeal if it appear that the justice had no jurisdiction." *The People ex rel. McClintock*, 13 Ill. 287.

Everything requisite to support a conviction should appear

City of Chicago v. Kenney.

in the record of conviction. Nothing will be presumed in favor of a conviction in a court of limited jurisdiction.

"A conviction must contain the following particulars: "

"An information or charge against defendant, a summons or notice of the information to defendant, in order that he may make his defense * * * his confession or defense * * * the evidence * * * all these matters must be particularly set out on the conviction." Hurd on Habeas Corpus, 401, 2d Ed.; In re Travis, Legal News, Vol. 10, p. 373; Sheldon v. Newton, 3 Ohio State, 494-499.

As to requisites of city complaints, see Commonwealth v. Gay, 5 Pickering, 44; Stephens v. Dimond, 6 New Hampshire, 330.

Of all the cases cited by appellant we are unable to find one where the court has sustained an action except on summons or complaint. In one case a *capias* was issued without complaint, but was served by reading, and no arrest made; held, to operate as a summons. City of Alton v. Kirsch, 68 Ill. 263.

MORAN, J. Sec. 84 of the City and Village Act declares that policemen in cities shall be conservators of the peace, and shall have power to arrest with or without process, all persons who break the peace, or are found violating any ordinance of the city or any criminal law of the State, and if necessary, detain such persons in custody over night or Sunday, or until they can be brought before the proper magistrate. Starr & Curtis' Ill. Stats. 479.

Sec. 278 of said act provides that in all actions for the violation of any ordinance of any city the first process shall be a summons, provided, however, that a warrant for the arrest of the offender may issue, in the first instance, upon the affidavit of any person that any such ordinance has been violated, and that the person making the complaint has reasonable grounds to believe the party charged is guilty thereof; and any person arrested upon such warrant shall, without unnecessary delay, be taken before the proper officer to be tried for the alleged offense.

The proceeding must be in the corporate name of the city, and is a civil action, in form, debt, and governed in all respects by the rules of procedure in civil cases. *Israel v. Jacksonville*, 1 Scam. 290; *Town of Lewiston v. Proctor*, 27 Ill. 414; *Town of Havana v. Biggs*, 58 Ill. 483; *Town of Partridge v. Snyder*, 78 Ill. 519; *Webster v. The People*, 14 Ill. 365.

It is not contended here that if this action had been commenced before the justice, by summons, any complaint or other form of pleading would have been necessary; but the argument seems to be that because there was an arrest of the defendant, the case took in some part a criminal form, and that a failure to file an affidavit or complaint showing probable cause and stating the nature of the accusation, deprived the justice of jurisdiction to hear the evidence and render judgment. Even if a complaint were required to be filed in criminal proceedings where the arrest was on view (on which question we express no opinion), no analogy would be furnished which would require a complaint or other written pleading in a civil proceeding to recover a fine or penalty for breach of a city ordinance where the offender was arrested on view. The fact that there is an arrest either by warrant or on view, does not change the proceeding from a civil to a criminal one. The justice has jurisdiction of the subject-matter by law, and if the offender is brought before him by an arrest on warrant, or by an arrest made on view, or by the service of a summons, he will have jurisdiction of the parties, and may proceed to the trial and determination of the case.

True, an affidavit or complaint is necessary to authorize the issuing of a warrant, but such affidavit or complaint is not the foundation of the justice's jurisdiction to hear the case and render judgment therein, for he might hear just the same case and render the same judgment where the action was commenced by summons, and where no affidavit or complaint or written charge of any kind was filed. In other words, by whatever means the justice obtains jurisdiction of the defendant, whether by arrest on warrant, arrest on view, or by service of summons, the practice and proceedings before the justice are to be the same as in any other civil suit. It was

said by the Supreme Court in *Ewbanks v. Town of Ashley*, 36 Ill. 177, where a warrant for the arrest of a defendant for violation of an ordinance was issued by a justice of the peace without any complaint or affidavit being filed, "when the jurisdiction is conferred upon justices of the peace in such cases, it follows that it must be held to authorize them to proceed as in any other cases. It then results, as a part of their jurisdiction, that they may hear such cases without complaint." The warrant in said case was served as a summons, but we are unable to perceive how that makes any difference as to the principle decided. The fact that no complaint is necessary in a proceeding before a justice to recover for the violation of an ordinance was also held in *Town of Jacksonville v. Block*, 36 Ill. 507.

It appears from the transcript of the justice set out in the statement of facts, that the defendant was arrested while committing the offense; that the action was debt for a penalty for disorderly conduct in violation of Section 1624 Revised Ordinances; that the defendant pleaded not guilty; that the witnesses were sworn and testified; that the court being fully advised, finds the defendant guilty of the charge and assesses the penalty or fine against him. This states with reasonable certainty an offense against the ordinance, and one of which the justice had jurisdiction. As it is admitted that it was lawful to bring defendant into court by arrest on view, it is difficult to conceive what the justice's record lacks of showing a regular proceeding and valid judgment, unless we reverse the holding of the Supreme Court, and say that a complaint or some other written pleading is necessary to sustain the jurisdiction of a justice of the peace in an action to recover a penalty or fine under an ordinance. But if the proceeding before the justice had been in fact irregular, by reason of a failure to file a complaint, or a sufficient one, such fact would not warrant the judgment of the Criminal Court in dismissing the action on motion.

The appeal brought all the parties before the Criminal Court, and it was the duty of that court to hear and determine the matter on its merits. The appeal is not to correct

some error of law, but it is to obtain a trial *de novo*, and the court had no power to determine whether the justice had jurisdiction of the subject-matter until the evidence was heard. "It is well settled in this court that no advantage can be taken in the Circuit Court of any irregularity in the process issuing from a justice of the peace or its service. * * * The only requisite is jurisdiction in a justice of the peace; for aught that appears he had jurisdiction in this case, and the suit should not have been dismissed." *City of Alton v. Kirsch*, 68 Ill. 261.

In that case the Circuit Court dismissed the suit on the appeal for the reason that the complaint filed before the justice appeared to be defective; but the Supreme Court said, the complaint in writing not being necessary, one defective in an important particular could not deprive the Circuit Court of the power to hear and determine the case on the facts, as they might be established in that court: and in *Town of Jacksonville v. Block*, *supra*, it was said that "no exception was allowable in the Circuit Court as to the form or service of the writ, nor to *any proceedings* before the justice. The duty of that court was to hear and determine the cause in a summary manner, according to its merits." See also *Byars v. City of Mount Vernon*, 77 Ill. 467.

The argument of the counsel, that this can not be treated as a civil proceeding because, in order to sustain it as such, the provision of our constitution forbidding imprisonment for debt would be violated, is without force. The debts intended to be embraced in that clause are those arising *ex contractu*. It does not include fines or penalties arising from violation of penal laws. *Kennedy v. The People*, 122 Ill. 649, and cases there cited. The committal of the defendant until the fine is paid, is necessary in such cases, and the power to do so indispensable to the safety of society, the preservation of good order and the enforcement of the ordinances. *Ex parte Bollig*, 31 Ill. 88.

We have carefully examined all the cases cited by counsel for appellee, some of which seem to have been relied on by the learned judge who decided this case in the Criminal Court.

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Tracy v. Williams, 4 Conn., was a criminal examination, and was decided on a distinction between the requirement of the Connecticut statutes and common law. So far as the case purports to go on general principles, it is *contra* to Lancaster v. Lane, 19 Ill. 242. There, Lancaster the justice, was sued as a trespasser for issuing an execution on which a sale was made. The execution was issued to collect a fine which had been imposed by the justice. The docket of the justice was introduced in evidence, and so far as related to jurisdiction, it recited that: "The *file* was willingly fit in view of the justice. The justice imposed a fine of \$5 each, giving no *rite* of evidence or jury." The Supreme Court held that the justice was entitled to be tried by his docket; that it showed a case properly docketed, and that the offense was committed in view of the magistrate. "The offender was in court, and therefore no warrant was necessary to bring him to court. * * * Being in custody of the officer and in court, and the court having jurisdiction of his person as well as of the offense, the magistrate could exercise the jurisdiction to the fullest extent by trying him." In Mayor of Newark v. Murphy, 11 Vroom, 145, the officer making the arrest had no authority under the law to arrest for the violation of ordinances, and the same is true of the case of Clark v. New Brunswick, 14 Vroom, 175. It is unnecessary to examine all the cases cited in detail. It is enough to say that they are all easily distinguishable from this case.

The judgment must be reversed and the case remanded to the Criminal Court for further proceedings in accordance with the law as here stated.

Reversed and remanded.

CHARLES COUNSELMAN AND ALBERT M. DAY

V.

CHARLES C. COLLINS.

Agency—Commission Merchants—Board of Trade—Action to Recover Commissions and Money Paid for Losses—Written Contract and Receipt—Evidence—Instructions—Verdict.

1. In order to bind a party by an adverse verdict upon conflicting evidence, it is essential that the jury should not have been wrongfully instructed against him.

2. The fact that the trial court gave a counter instruction does not cure the giving of an erroneous one, it being impossible to tell which one the jury regarded, if either.

3. In an action by commission merchants to recover an amount claimed to be due for commissions and money paid, the fact being that a sum was previously paid by a third person for defendant to plaintiffs, who thereupon delivered to his attorney a receipt in full, this court holds that, notwithstanding the execution and delivery thereof, it was admissible for the plaintiffs to show that by a previous agreement between themselves and the defendant, the receipt had no effect as to them; that it was never intended as a contract but was made for another purpose.

[Opinion filed December 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

MESSRS. TENNEY, HAWLEY & COFFEEN and S. S. GREGORY, for appellants.

MESSRS. FRED. A. SMITH and CRATTY BROTHERS & ASHCRAFT, for appellee.

GARY, P. J. The appellants sued the appellee for commissions and money paid for losses on stock and grain dealings on the boards in New York and Chicago, in which the appellants were agents of the appellee. The evidence is very voluminous, but the part affecting the question to be decided may be briefly stated.

35	68
60	835
35	68
67	687

Counselman v. Collins.

The losses of the appellee were very great. Whether he had used money that he had no right to use was in question. To get him out of difficulty had become a family matter.

A witness named Keep paid to the appellants for the appellee \$7,500. The appellants were informed that the money was furnished by relatives of the appellee, and that Keep acted for them. After the money was paid, Keep and one of the appellants informed the attorney of the appellee that a settlement had been made, and the appellants gave to the attorney a receipt, as follows:

“\$7,500.

CHICAGO, April 13, 1886.

Received of Charles C. Collins seven thousand five hundred dollars in full for all debts, claims, demands, balances, stock liability, and liability of every name and nature, due from him at that date; it being understood that all accounts and dealings between said Collins and the undersigned are this day closed and fully satisfied.

COUNSELMAN & DAY.”

Whether other considerations than the \$7,500 entered into the settlement was a disputed matter on the trial. There was testimony on the part of the appellants, that before the meeting at which Keep paid the money, and at which the appellee was not present, appellee told the appellants to sign any paper that should be asked of them; that it would make no difference, he would pay his account in full.

The court instructed the jury: “That the paper in evidence, dated April 13, 1886, which is in part a receipt in full, is a written contract, signed by the plaintiffs, Counselman & Day, and, as they do not dispute that they signed it voluntarily, you are instructed that it amounts in law to a written contract; that all matters prior to that date, are finally adjusted between them and discharged; so, if you believe from the evidence that it was entered into by the respective parties fairly and in good faith, it shuts out all conversations or promises which may have occurred at that time or prior thereto, which might tend to vary or contradict its terms, and no new promise to pay plaintiffs their claim made at that time, or before or after, would make the defendant liable.” So far as relates

to a subsequent promise the instruction is correct. 1 Ch. Cont. 58, note "k"; 1 Para. on Cont. 434, note "u."

But notwithstanding the execution and delivery of the receipt to the attorney of the appellee, it was admissible for the appellants to show that by a previous agreement between the parties, the receipt had no effect between themselves; that it was never intended as a contract, but was made for another purpose. The authorities to this point are cited in 1 Greenleaf on Ev., Sec. 284, note 2, and 2 Tay. on Ev. 967, note 4.

What application to the facts of this case the phrase, "fairly and in good faith," has, is not easy to determine, but it is not susceptible of any meaning that could put before the jury the question whether the receipt was, between the parties, intended to have, or not to have, any effect. This is not a variation of a written contract by parol, but showing by parol that a paper purporting to be a contract, is not a contract. Earle v. Rice, 111 Mass. 17; Pym v. Campbell, 6 E. and B. 370; 88 E. C. L. R.

That for the appellants the court gave a counter instruction is not an answer to the error, as it can not be told which the jury regarded, if either. W., St. L. & P. v. Shacklet, 105 Ill. 364; Leyenberger v. Paul, 12 Ill. App. 635.

Nor is it true, as claimed in the brief for the appellee, that as the appellants do not claim a reversal because the evidence is insufficient, therefore, whatever the evidence tends to show in favor of the appellee must be taken as absolutely proven. It may be conceded that a verdict for the appellee upon the evidence shown by this record, with proper instructions, or with none, if none were asked by the appellants, would be conclusive. Probably that is true. But in order to bind a party by an adverse verdict upon conflicting evidence, it is essential that the jury should not have been wrongfully instructed against him. Wabash Ry. v. Henks, 91 Ill. 406.

The judgment must be reversed and the cause remanded.

Reversed and remanded.

McDonald v. Rosengarten.

MICHAEL C. McDONALD ET AL.

V.

GEORGE D. ROSENGARTEN ET AL.

*Mechanic's Liens—Act to Amend Mechanic's Lien Law, Secs. 4-28—
Statement of Account—Verification of—Affidavit—Trust Deed—Bill to
Foreclose—Leasehold Interest.*

1. An account is verified the same as a petition or plea by making oath to the truth of the facts set forth therein.
2. The filing of a statement verified by an affidavit is essential to the creation of a mechanic's lien.
3. Such statement is required to set forth the amount due after allowing all credits, and the times when the material was furnished, or the labor performed, and a correct description of the property to be charged with the lien.
4. Such requirements are not met by stating the amount due in a lump sum, after deducting all credits, without stating any items composing the account, or showing what the credits were; and stating that the work or contract was completed at a certain time, without showing the time or times when it was commenced or performed, or the period during which the materials were furnished or the labor claimed for, rendered.
5. Provisions of law which are conditions precedent to the attachment of a lien must be strictly complied with.

[Opinion filed December 2, 1889.]

IN ERROR to the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Messrs. WOOLFOLK & BROWNING, for plaintiffs in error.

Messrs. MUNROE & GEER, for defendants in error.

The General Assembly required persons asserting mechanics' liens to file the claim of lien setting forth the particulars mentioned in the statute, for a purpose. That purpose was to give information to all concerned in the property sought to be charged, of the particulars which the statute requires to be stated.

35	71
41	351
134	126
35	71
46	289
35	71
50	480
50	468
35	71
58	418
58	619
35	71
62	153
35	71
64	147

"The account or claim of lien should be certain and specific as to the amount, character and value of the work and materials furnished, and the dates when the same were furnished, so as to advise the owner, other lien creditors and all persons interested, of the particulars of the demand sought to be enforced, and enable them, if they desire to do so, to contest the same." 2 Jones on Liens, Sec. 1404. In *Noll v. Swineford*, 6 Pa. St. 191, it is said, upon the point now in hand:

"As the law calls for nothing unreasonable at the hand of him who would fasten an incumbrance upon the property of his neighbor, no just ground of complaint is afforded by insisting upon a rigid adherence to its provisions. The information it exacts is or ought to be entirely within the power of the creditor to give, and an omission to put it on the record is, therefore, without excuse. Indeed, the great object of the statute in pointing out the characteristics of the statement to be filed would, in the end, be utterly defeated, were we to indulge the laxity of practice which ignorance and carelessness conspire to introduce and perpetuate."

In the case just cited it was held, under a statute which required the mechanic's lien claimant to file a statement of "the amount due, and the nature or kind of work done, or the kind and amount of material furnished, and the time when the materials were furnished or work done," that the statement must give the amount claimed for the work and materials in distinct items, and also the time when the work was done and the time when the materials were furnished, or the lien would be defeated.

"The dates of the items of the claim should be so stated as to enable parties interested to discover during what period the labor was done and the materials furnished. The rule requires certainty to a common intent, not precision in the statement." 2 Jones on Liens, Sec. 1407.

When the statute requires the claim to state the time of doing the work or furnishing the material, the claim must give the period during which the work was done and the materials delivered, or the lien will be defeated. *Rush v. Able*, 90 Pa. St. 153; *Valentine v. Rawson*, 57 Iowa, 179.

McDonald v. Rosengarten.

Not one of the claims in question shows the time during which the work was done or material furnished, and every one for that reason is insufficient. The most that is shown in any case is the time when the work was completed. This is not sufficient. *Lynch v. Feigle*, 11 Phila. 247.

In Phillips on Mechanics' Liens, Section 359, it is said: "Where the claim must state the time when the materials were furnished or the work was done, this requirement must be complied with, otherwise the claim will be defective. It is essential to the owner of the building, the purchaser, and other lien creditors, to enable them to trace out the truth of the claim, and guard against error or imposition." It has been held that where the claim must give the time of doing the work, it was not sufficient to say it was done between two given dates. *Ass. of Jersey v. Davison*, 5 Dutch. 415.

"Statutes which require the filing of a true account of the work done or materials furnished necessarily imply an itemized or detailed statement of the transactions which are the foundation of the lien." 2 Jones on Liens, Sec. 1417.

Section 2133 of the Iowa code required the creditor to file a "just and true statement or account of the demand due him after allowing all credits." That is the very language of our statute. In *Valentine v. Rawson*, 57 Iowa, 179, it was held that the statute required the statement or account to give the items of which it consisted in detail.

In Missouri, the statute provided that the contractor should file in the office of the clerk of the Circuit Court a "just and true account of the demand due him after all credits have been given." In *McWilliams v. Allan*, 45 Mo. 573, and *Graves v. Pierce*, 53 Mo. 423, it was held that the paper filed must give each item of the account.

Without further examination of the authorities on this question it will be sufficient to cite several others which lay down the same principle. *Shackelford v. Beck*, 80 Va. 573; *Carson v. White*, 6 Gill. 17-27.

Tested by the principles sustained by the authorities cited, each claim for lien shown in the record is utterly bad and insufficient.

Counsel for plaintiffs contend that the claims for liens are aided by averments in the cross-bills and proof in support of them, and that the mechanic's lien law must receive a liberal construction in favor of the contractor. Both positions are wrong. Thus the latest author on the subject says:

"The notice or claim can not be amended after it is filed. The claim is not in the nature of an instrument in writing which a court of equity may reform in appropriate cases. It is rather a prerequisite to the maintenance of a proceeding which gives the plaintiff an extraordinary remedy, and to receive the benefit of this he must comply with the terms on which the statute affords this remedy." 2 Jones on Liens, Sec. 1455.

The Supreme Court of Illinois has uniformly denied the rule insisted upon by plaintiffs. To quote authorities on the point seems useless, but we give some of them. In *Belanger v. Hersey*, 90 Ill. 72, it is said:

"The statute which gives a mechanic a lien is in derogation of the common law and must receive a strict construction, and no person can obtain a lien under it unless a clear compliance is shown with the requirements of the statute."

Other cases enforce the same rule of construction. *Stephens v. Holmes*, 64 Ill. 336; *Rothgerber v. Dupuy*, 64 Ill. 452; *Canisius v. Merrill*, 65 Ill. 67.

MORAN, J. Defendants in error filed their bill to foreclose a trust deed upon a certain leasehold interest in a lot situate in Chicago, and made plaintiffs in error parties defendant, as parties who claimed some interest in or lien upon the premises, and alleged that such interests or claims, if any, were subject to the lien of said trust deed. Each of the ten plaintiffs in error answered and filed a cross-bill setting up a mechanic's lien upon the leasehold interest for work done and materials furnished in the erection of a building thereon. On the hearing the court denied the liens claimed and dismissed the several cross-bills, which action of the court is assigned as error.

The contracts on which the respective claims for lien were based, were original contracts with the alleged owner of the

McDonald v. Rosengarten.

leasehold, and were made in the year 1888, after the amendments of the mechanic's lien law passed in 1887, were in force. Various considerations and arguments are urged against, and in support of the action of the court in denying the mechanic's liens, and counsel have filed elaborate briefs and cited many authorities in support of these various contentions. We find it unnecessary to discuss all the points made by counsel, as we are of opinion that the action of the court must be sustained on the one ground, without reference to any other, that the plaintiffs in error failed to comply with the requirements of the act to amend the mechanic's lien law approved May 31, 1887. By said act, section 4 of the lien law was amended to read as follows: "Every creditor or contractor who wishes to avail himself of the provisions of this act shall file with the clerk of the Circuit Court of the county in which the building, erection, or other improvement to be charged with the lien is situated, a just and true statement or account or demand due him after allowing all credits, setting forth the times when such material was furnished or labor performed, and containing a correct description of the property to be charged with the lien, and verified by an affidavit. Any person having filed a claim for a lien as provided in this section, may bring a suit at once to enforce the same by bill or petition in any court of competent jurisdiction in the county where the claim for a lien has been filed."

Section 28 as amended is as follows: "No creditor shall be allowed to enforce a lien created under the provision of this act as against or to the prejudice of any other creditor or incumbrancer or purchaser, unless a claim for a lien shall have been filed with the clerk of the Circuit Court, as provided in section four of this act, within four months after the last payment shall have become due and payable. Suit shall be commenced within two years after filing such claim with the clerk of the Circuit Court, or the lien shall be vacated."

Plaintiffs in error attempted to comply with the requirements of section 4, by filing with the clerk statements which are all substantially alike, which give no items of the labor

or materials, do not set forth the times when the materials were furnished or the labor performed, except that in some of the statements of claim, speaking of the performance of the particular contract or work for which the claim is made, it is stated that it was done or completed on or about May 25, 1888.

We think it at least doubtful whether such a statement of claim is a compliance with the statute.

The phraseology of section 4 is rendered inapt, clumsy and somewhat uncertain by the use of the conjunction "or" between the words "account" and "demand," and there is force in the suggestion of counsel for defendants in error that the true sense is rendered by rejecting said "or" and inserting in its place the words "of the," so that the phrase would read "a just and true statement or account of the demand due him." However that may be, it is clear that the document to be filed with the clerk, whether it be called a statement, an account, or a demand, is required to set forth the amount due after allowing all credits, and the times when the material was furnished or the labor performed, and a correct description of the property to be charged with the lien. These requirements are certainly not met by stating the amount due in a lump sum, after deducting all credits, without stating any items composing the account, or showing what the credits were; and stating that the work or contract was completed at a certain time, without showing the time or times when it was commenced, or performed, or the period during which the materials were furnished or the labor claimed for rendered.

The statute requires the statement of something more than the amount due after allowing all just credits. What is called for is a statement or account of the claim or demand, just and true; that is, amounts, dates and periods. Similar provisions in the statutes of other States have been construed to require itemized and detailed statements of the transactions on which the claim for lien is based. See 2 Jones on Liens, Sec. 1417, and Phillips on Mechanics' Liens, Sec. 349, and cases cited by those authors.

It is contended by counsel for plaintiffs in error that the

McDonald v. Rosengarten.

statute is to be liberally construed to effect its purpose in securing the lien provided for. The rule generally announced is that the law, giving, as it does, an extraordinary remedy to one class of persons, is to be strictly construed. *Belanger v. Hersey*, 90 Ill. 70; *Stephens v. Holmes*, 64 Ill. 334. Of course no construction is to be adopted which tends to defeat the object of the statute, but provisions of the law which are conditions precedent to the attachment of any lien, must be strictly complied with, and where the statute requires the giving of a notice of the filing of the statement and the characteristics of such notice or statements are specified in the statute, to hold that a notice or statement not setting forth the matters required was sufficient, would be to defeat the object of the law.

The statement or account which is to be filed is required to be verified by affidavit. None of the statements or accounts filed by the plaintiffs in error were *verified* by affidavit. Each claimant attached to the claim filed, an affidavit stating that he performed the labor and furnished the materials set forth in the above named statement of claim, and that there is now due him for said labor and materials, after allowing all credits and set-offs, the sum of (stating the amount claimed) which affiant charges and alleges is a lien upon the said above described premises. Such an affidavit is not, and does not purport to be a verification of the statement of accounts. To verify an account is the same as to verify a petition or a plea, and that is always done by making oath to the truth of the statement of the facts as set forth in the petition or plea.

The filing of a statement *verified* by an affidavit is essential to the creation of the lien. The statements, even if they would pass in other respects, were all fatally defective in this. *Phillips on Mechanics' Liens*, Sec. 366; *Conklin v. Wood*, 3 E. D. Smith, 662.

We rest the affirmance of the decrees dismissing the cross-bills especially on this ground of lack of verification of the statements.

Decrees affirmed.

 Matson v. Davies.

CANUTE R. MATSON AND J. M. KELSEY

V.

ROBERT K. DAVIES AND J. M. DAVIES.

Replevin—Appeal from Justice Court—Dismissal of—Failure to award Return—Bill of Exceptions—Absence of.

In the absence from the record of evidence to the contrary this court will presume the judgment of the trial court to have been correct.

[Opinion filed December 2, 1889.]

IN ERROR to the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

Messrs. H. T. & L. HELM, for plaintiffs in error.

Messrs. MOSES, NEWMAN & PAM, for defendants in error.

GARY, P. J. On motion of the plaintiffs below, defendants here, the County Court, probably without notice to, or appearance by the adverse party, defendant below, plaintiff here, dismissed a replevin suit, pending in that court on appeal from a justice of the peace, without awarding a return of the property. The omission is now assigned as error.

There is no bill of exceptions. Probably the plaintiffs in error had no notice of the action of the court during the term. If this were an original question it would seem that the plaintiffs in error ought to have redress; that, being entitled, *prima facie*, to a return of the property when the plaintiffs below dismissed their suit, it is error in the judgment of the County Court not to award it to them, unless some reason for not doing so, or that they had an opportunity to put upon the record the fact, if fact it be, that there was no such reason, is shown. But the law of this State is settled by numerous decisions that the judgment below will "be presumed to be correct, where it is not shown by the record

36	78
50	656
51	426
36	78
54	143

Lundberg v. Boldenweck.

to be otherwise." Blair v. Ray, 103 Ill. 615; same case, 5 Ill. App. 453, where this presumption sustained the probably *ex parte*, and if *ex parte*, probably erroneous, disposition of a replevin suit.

In Vinyard v. Barnes, 124 Ill. 346, the same doctrine is reiterated, though there the attack upon the judgment in replevin was collateral. It is therefore to be presumed on this writ of error, though probably it is not true, "that it was made to appear to the court that the plaintiff in the suit had become entitled to the possession of the property." Case last cited.

What remedy may be had on that part of the condition of the bond providing for the payment of all costs and damages occasioned by wrongfully suing out said writ of replevin, or by following the case of Bruner v. Dyball, 42 Ill. 34, is not a subject for present consideration, but the remedy now sought is barred by a principle of decision which only the Supreme Court or the Legislature may change.

Affirmed.

ANDREW G. LUNDBERG

v.

WILLIAM BOLDENWECK.

35	79
51	193

Municipal Corporations—Supervisor—Compensation—Payment—Injunction—Secs. 1 and 4, Art. 13, Chap. 139 R. S.—Fraudulent Claim.

Upon a bill filed by a tax payer to enjoin the delivery of a town warrant to defendant, for his compensation as town supervisor, it being alleged that his bill for services rendered was incorrect, this court declines, in view of the evidence, to interfere with the decree in behalf of the complainant.

[Opinion filed December 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding.

Messrs. WALKER & JUDD, for appellant.

Mr. H. H. ANDERSON, for appellee.

GARNETT, J. The bill in this case was filed by appellee, a taxpayer of the town of Lake View, in Cook county, to enjoin the delivery of a town warrant to appellant for his compensation as supervisor of the town for the period beginning in April, 1888, and ending March 3, 1889.

The bill alleges that during that period Lundberg transacted no business whatever for the town other than seven days' attendance within the town as a member of the board of auditors of the town; that for such attendance he is entitled to only \$1.50 per day, but that the board of auditors allowed his claim to the amount of \$584.50, for 318 days' service in the town and forty-two days' service outside of the town, and had ordered the town clerk to issue to Lundberg a warrant upon the funds of the town for the sum of \$584.50.

The town clerk and Lundberg were made defendants, and an injunction prayed for to restrain the delivery of the warrant. The town clerk answered, confessing the bill, and Lundberg demurred. The demurrer was overruled, and a decree entered as prayed for, from which Lundberg appeals. Sec. 1, Art. 13, Chap. 139, R. S., provides that in each town the supervisor, town clerk and justice of the peace of the town shall constitute a board of auditors. Sec. 4 of the same article requires the board of auditors to examine and audit all charges and claims against the town, and the compensation of all town officers, except the compensation of supervisors for county services.

In *Fitzgerald v. Harms*, 92 Ill. 372, it was decided that a court of equity can not interfere by injunction with the action of a board of county commissioners in allowing the amount of a contractor's bill for work and materials on the county court house. There the authority of the county board was to examine and settle all accounts against the county. The court declined to inquire whether the claim of Harms, the contractor, was meritorious or not, holding that the action of the

Kingsland v. Koeppe.

board, in a matter intrusted to them by law, was final unless fraud is shown. This ruling can not be disputed. But the bill filed in this case charges that on March 3, 1889, appellant rendered his bill for 318 days of service in the town at \$1.50 per day, and forty-two days outside of the town at \$2.50 per day, and that he was elected to the office in April, 1888.

If these allegations are true, it is apparent that appellant rendered his bill for services covering at least twenty-eight more days than had then elapsed in the entire period after his election, including Sundays. The board could not have failed to perceive that the services alleged could not have been performed, unless they were ignorant and stupid beyond all belief. The allegations of the bill may not be true, but they present a *prima facie* case of fraud and required an answer. The decree is affirmed.

Decree affirmed.

PHILIP S. KINGSLAND ET AL.

V.

HERMAN KOEPPE ET AL.

SAME

V.

SAME.

Negotiable Instruments—Corporation Notes—Guaranty—Indorsement—Evidence—Proposition of Law.

1. In a case tried without a jury, the finding of the court must stand unless it appears to have been based upon an erroneous view of the law.

2. The writing of his name by the payee of a note on the back thereof implies a contract that parol evidence is inadmissible to vary.

3. On a blank indorsement by a stranger to the note the law implies no contract, but presumes, in the absence of evidence to the contrary, the assumption of a contract of guaranty.

4. The presumption is, unless the facts are shown to have been otherwise, that the indorsement was placed upon the note when the same was

35	81
41	18
35	81
137	344
35	81
58	264
35	81
59	502
35	81
67	331
35	81
69	115
35	81
70	156

made, and therefore was intended as a guaranty supported by the original consideration of the note.

5. Evidence as to conversations between the parties at the time of the indorrement, is admissible in such case, and it is a question of fact whether such signer did, in fact, intend that personal liability as guarantor should be incurred or not.

6. Harmless errors can not be complained of.

[Opinion filed December 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

MESSRS. TENNEY, HAWLEY & COFFEEN, for appellants.

MR. S. P. DOUTHART, for appellees.

GARY, P. J. These are actions by the appellants against the appellees as guarantors of promissory notes of a corporation, payable to the appellants, upon which the appellees had indorsed, at the time the notes were made, their names in blank.

The appellees were all members of an executive committee of the corporation, to which committee had been delegated by the corporation the power to procure the machinery, which was the consideration of the notes. That committee had intrusted to one of their number, not an appellee, the details of making the contract with the appellants, and he had agreed that for the deferred payments for the machinery, the corporation should give notes indorsed by the executive committee individually. Whether the appellees knew before the machinery was furnished, of that agreement that they should indorse, was a subject of conflicting testimony on the trial. There was also an irreconcilable conflict in the testimony as to what happened when the notes were made, with a preponderance in the number of witnesses in favor of the appellees, and as to the probabilities, in favor of the appellants. The case was tried without a jury, and the finding by the court, in a case of such conflict, must stand, unless it appears

Kingsland v. Koeppel

to be based upon a wrong view of the law. *Field v. C. & R. I. R. R. Co.*, 71 Ill. 458, and cases there cited. The record recites that, the evidence being all in, "Thereupon the court held the following proposition of law at the request of the plaintiffs:

"The court holds that representations made by the plaintiffs to the defendants, at the time the notes in question were executed, that the defendants would not make themselves liable by signing their names on the back of the notes, would not constitute a defense to this suit, even if the defendants were thereby induced to sign their names on the back of the notes in the manner shown by said notes."

Plaintiffs asked the court to hold the following proposition of law: "The court holds that the contract implied by law from the position of the defendants' names on the back of notes described in the declaration, can not be varied or lessened by parol evidence that the defendants were not to be personally liable." The court refused so to do, to which ruling plaintiffs excepted. The court further held that it was competent and admissible for the defendants to show by parol evidence that the plaintiffs agreed with them at the time the notes in suit were executed, that they should not be held personally liable in any way if they would sign their names on the backs of the notes, and if such were the facts the plaintiffs were not entitled to recover, to which ruling of the court the plaintiff excepted.

It is undoubtedly the law that the name of the payee written by him in blank on the back of a note, implies by law a contract, that parol evidence is inadmissible to vary. *Johnson v. Clover*, 121 Ill. 283, where that doctrine was applied, although the payee had written his name twice. It was unsuccessfully contended that the first indorsement was enough to pass the title to the note, and the second must therefore be for some other purpose, to be shown by parol. The former cases are there cited. But on a blank indorsement, by a stranger to the note, the law implies no contract. It presumes as a fact in the absence of evidence to the contrary, that the parties made for themselves a contract of guar-

anty; so it presumes the parties were *sui juris* and *compos mentis*.

The language of the decisions in this State upon the subject has not been always well guarded, but the effect of the decisions has been uniform. In the first case where it was a matter for decision, Cushman v. Dement, 3 Scam. 497, though it had been discussed in Camden v. McKoy, same volume, 437, such an indorsement was held to be *prima facie* evidence of a liability in the capacity of guarantor, "liable to be rebutted by parol proof," and in the last case, so far as the briefs in this case show, it is reiterated that such an indorsement "raises a presumption only that it is intended thereby to assume the liability of a guarantor, which may be rebutted by proof that the real agreement between the parties was different." Eberhart v. Page, 89 Ill. 550.

It is, then, always a question of fact what the parties intended. If nothing is shown but the note with the blank indorsement, the presumption is that the indorsement was placed there when the note was made: Stewart v. Smith, 28 Ill. 397; White v. Weaver, 41 Ill. 409; and therefore was intended as a guaranty, supported by the original consideration of the note. Joslyn v. Collinson, 26 Ill. 61.

But the presumption of intention to guarantee is open to rebuttal by showing the real agreement, as much as the presumption of the date of indorsement is, by showing when it was in fact made. All conversation between the parties, therefore, at the time of the indorsement, is admissible in evidence, and it is a question of fact whether the parties did, in fact, intend what the law presumes they did intend, when what they did intend is not shown; and if it is shown by such conversation that in fact no personal liability was intended to be assumed by the indorsers, then none was incurred.

The first proposition held by the court was more favorable to the appellants than this view of the law warrants. The member of the committee who made the contract with the appellants also indorsed the notes, and was a defendant below. He withdrew his plea and judgment was entered against him. If that was an irregularity it did appellants no harm,

Little v. Dyer.

and they can not complain of it. Clause v. Bullock, 20 Ill. App. 113.

There is no error, and the judgments are affirmed. The cases are alike in the questions made, and they have been submitted here on one set of briefs.

Judgment affirmed.

JOHN Z. LITTLE AND ELIZABETH C. LITTLE

v.

JOHN W. DYER.

Landlord and Tenant—Lease—Conditions—Warrant of Attorney—Rent—Judgment by Confession—Fraudulent Representations.

1. The filing of a cognovit in an action for the recovery of rent, acknowledging the cause of action, the amount of damages, and releasing all errors in conformity with a condition in a lease naming a certain person as attorney for the lessees with such powers, operates to bind the parties executing the same, and no mere error up to and including the entry of judgment can be urged as a reason for the reversal thereof, unless a want of jurisdiction or exercise of power not given, is shown.

2. It is the duty of a lessee, upon the discovery that representations which induced the hiring of the premises were fraudulent, to rescind the lease, if it is desired to escape its obligations. Failing to do so amounts to an election to continue the same in force, and to abide by its covenants.

3. Fraudulent representations made to induce the acceptance of a lease under seal, can not be relied upon as a defense in an action thereon; the remedy of the injured party in such cases is in equity.

4. Upon the cancellation of a lease the delivery by the lessee of his copy to the lessor can have no effect upon the warrant of attorney provided for, in the absence of a binding agreement canceling the same.

[Opinion filed December 2, 1889.]

IN ERROR to the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. J. W. MERRIAM, for plaintiffs in error.

35	85
138	272
35	85
46	371
35	85
73	199
35	85
175	376
35	85
87	654
85	85
102	1660

Messrs. FLOWER, SMITH & MUSGRAVE, for defendant in error.

GARNETT, J. By lease dated March 6, 1887, John W. Dyer demised to John Z. Little, Elizabeth C. Little, George O. Morris and Annie E. Morris, the premises known as the Standard Theatre in Chicago, and all the scenery and equipments thereof, for a term of three years, four months and some days, the exact term not appearing in the record. The lessees entered into possession of the premises, using the same for theatrical business, until about July 14, 1887, when the lease was canceled, and a new lease under seal, for the same premises and personal property, was made by Dyer to the plaintiffs in error and Charles O. White for a term beginning September 1, 1887, and ending June 30, 1890. The lessees by the terms of the last lease agreed to pay as rent for the term, the sum of \$36,000, which was to be paid in installments as specified in the lease, and all water rents, gas bills, cost of electric light, all license fees, and personal property taxes, levied during the term on the property demised; that in case they failed to pay the water rates and gas bills, the lessor might pay them, and the amounts so paid should be deemed so much additional rent. The premises were occupied by the lessees until December 3, 1888, when the term was ended by mutual consent. In the lease dated July 14, 1887, there was this clause:

"The party of the second part hereby irrevocably constitutes C. H. Remy or any attorney of any court of record of this State, attorney for him, her and them, in his, her or their name, on default of any of the covenants herein to enter his, her or their appearance, in any court of record, waive process and service thereof against any one or more of all of said parties of the second part in favor of said party of the first part for forcible detainer of said premises, with costs of said suit, or to confess judgment from time to time for any rent which may be then due by the terms of this lease, with costs, and to waive all errors and all rights of appeal from any such judgment or judgments."

Little v. Dyer.

On May 17, 1889, Dyer filed in the Superior Court his declaration against the plaintiffs in error (White having died as it is said) alleging there was due him, under the lease, the sum of \$6,772.53, and attached to the declaration a copy of the lease. At the same time a cognovit was filed in the case signed by C. H. Remy, as attorney for the defendants, acknowledging the cause of action, the amount of damages, and releasing all errors in entering the judgment. At the same term the defendants appeared and moved the court upon affidavits then presented, to set aside the judgment and give defendants leave to plead. The motion was overruled and this writ of error was sued out to reverse the judgment as well as the action of the court in overruling the motion.

The waiver of errors is binding on the parties executing the warrant of attorney, and no more error up to and including the entry of judgment can be urged as a reason for reversal of the judgment, unless a want of jurisdiction or exercise of power not given, is shown. *Frear v. Com. Nat. Bank*, 73 Ill. 473; *Hall v. Hamilton*, 74 Ill. 437.

The only point that can be said to touch the jurisdiction, is that the warrant of attorney did not authorize any judgment, except against the plaintiffs in error and Charles O. White jointly. We think the warrant gave power to confess a judgment for rent against all, or any number of the lessees, and in any event that *Knox v. Winsted Savings Bank*, 57 Ill. 330, answers the question adversely to plaintiffs in error.

Aside from jurisdictional infirmities and absence of the power exercised, a case of this character comes to a court of review upon equitable features; the burden is therefore upon the defendant to show that the merits of the case are with him, and the question is whether the defendant should have been allowed to plead. *Knox v. Winsted Savings Bank*, *supra*. Turning to the affidavits to ascertain the merits of the case, we find it alleged, that prior to the making of the first lease Dyer made representation to the lessees therein as to the receipts of the theatre for some months prior to that time, as to its then current business, as to the amount of the expenses necessary to run the theatre, and as to the intention of the

proprietor of another place of amusement in the vicinity to close the same, all of which statements affiants say were false and known by Dyer to be false; that the previous receipts, during the time specified, were not more than about half as large as represented by Dyer; that the expenses were about fifty per cent larger than stated by him; that the first four weeks' expenses of running the theatre under the first lease with the same employes and expenses as under Dyer's management was from \$100 to \$200 per week larger than the amount so represented by Dyer, and that the place of amusement in the vicinity which Dyer assured them was to be closed had been ever since kept open and run as a place of amusement; that on and before the execution of the lease of July 14, 1887, John Z. Little offered Dyer \$1,000 to release the defendants from the obligations of the lease of March 6, 1887, and that the lease of July 14, 1887, and the possession of the theatre was surrendered to and accepted by Dyer and the lease terminated about December 3, 1888. From their affidavits it appears that the falsity of at least one of the material representations alleged as a defense was discovered by plaintiff in error within a month after the execution of the first lease, but no information is given as to the time when the other alleged representations were found to be untrue. If the lessees desired to rescind on account of the alleged fraud, it was their duty to do so promptly when they discovered it. Failing to do so, they elected to continue the lease in force, and are liable on the covenants, and must be remitted to their remedy, if any they have, by action for the deceit or by bill in equity.

Upon discovery of the fraud the lease could have been terminated at once by bill in equity to rescind, and without any offer by Little to pay the lessor \$1,000. He need not have implored a release as a matter of favor. But whether from ignorance or otherwise, they waived their rights, permitted the first lease to be canceled and actually entered into the covenants of a new one. It is too late to say that they are not held to the performance of the latter covenant. But a complete answer to the allegations of fraudulent representa-

Little v. Dyer.

tions to induce the lessees to accept the lease is found in Johnson v. Wilson, 33 Ill. App. 639, where we held that such representations are no defense to an action on an instrument under seal; that the remedy of the injured party is in equity. Counsel for plaintiffs in error say the affidavits prove a cancellation of the lease, and thereby the warrant of attorney became *functus officio*. The statement is that the lease and the possession of the theatre was surrendered to and accepted by the plaintiff. What was meant by a surrender of the lease is open to some doubt. It is the statement of a conclusion, not of a fact. But giving it a liberal interpretation for the plaintiffs in error, it may be supposed that they delivered to Dyer the duplicate or counterpart of the lease which Dyer gave them on July 14, 1887. If that is the fact, it would have no effect on the warrant of attorney, because, in the absence of proof, it must be presumed that Dyer also had and kept a duplicate. The warrant was a security exacted by Dyer when the demise was made, and he could avail himself of it until by some affirmative act he relinquished his rights thereto. Delivery of the duplicate lease to him added nothing to the surrender of the premises. The term was thereby ended, and the lessees had no reason to retain a paper which, so far as their interests were concerned, could be of no further benefit to them. It would be just as reasonable to say that if the lessees could only postpone action on the warrant until the term ended by the lapse of time, no action could be based thereon. In the absence of a binding agreement canceling the warrant of attorney it must be considered as remaining in force. The judgment of the court overruling the motion to set the same aside is affirmed.

Judgment affirmed.

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UNITED STATES EXPRESS COMPANY ET AL.

V.

BYRON L. SMITH, RECEIVER.

Insolvency—Bank—Funds in Another State—Assignment of Claim—Attachment—Petition by Receiver that Proceedings be Enjoined and Funds Released—Decisions of Other States—National Constitution, Art. 14, Sec. 1—Parties—Estoppel—Res Adjudicata.

1. The pending of a receiver's petition that attaching creditors of his insolvent be required to discontinue proceedings in another State, and to release and pay over moneys in their hands, without a restraining order, has no effect on such suits.

2. Where the defendant is duly served with process, or appeared in the cause, the judgment of a court of a given State is conclusive for all purposes and is not open to inquiry upon the merits. If the judgment is conclusive in the State where it was pronounced, it is equally conclusive in all the courts of any other State, and the Legislature of another State is powerless to authorize its courts to open the merits and review the cause, or to enact that such a judgment shall not receive the same faith and credit that it had by law in the State where it was rendered.

3. A receiver employing counsel to enter the appearance of the insolvent in a given suit, and the procuring by him of the release of funds attached therein, through the offices of a surety company, operate to make him a party thereto.

4. The failure to present a given defense does not preserve the right to open the litigation in another forum. The principal of *res adjudicata* extends not only to questions of fact and of law, which were decided in a former suit, but also to the grounds of recovery or defense, which might have been, but were not presented.

5. It is the rule in New York that an assignee by operation of law can not supersede an attachment lien acquired by a creditor of an insolvent, although the assignment was made before the lien was acquired, the creditor and insolvent both being residents of the State.

[Opinion filed December 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Messrs. JAMES FRAKE and JAMES L. HIGH, for appellant United States Express Company.

Mr. E. A. OTIS, for appellants Charles C. Boyles personally and as guardian, and the Merchants National Bank.

Messrs. WALKER & EDDY, for appellee.

GARNETT, J. The Traders Bank of Chicago becoming insolvent, one Tallman, on October 2, 1888, filed his bill in the Superior Court, praying for the appointment of a receiver, and a dissolution of the corporation. A receiver was on the same day appointed by the court, but refusing to serve, appellee was appointed in his stead the day after, immediately qualifying and entering upon the duties of the office. By the order of appointment the receiver was invested (so far as it was in the power of the court to do so) with all the property and rights of action of the bank; its officers were directed to execute for the bank an assignment to him of all its effects and he was empowered to institute suits in law or equity for the recovery of any assets, claims or choses in action belonging to or due the bank. No assignment to the receiver was executed by the bank or its officers. At the time of the appointment of the receiver there was on deposit in the Seaboard National Bank, the Tradesmen's National Bank and the Continental National Bank, all of New York, to the credit of the Traders Bank, large sums of money. The United States Express Company, a corporation organized under the laws of New York, the Merchants National Bank of Chicago, Charles C. Boyles personally, and Charles C. Boyles, guardian of Mary E. Gossage and others, minors, were severally creditors of the Traders Bank when the bill was filed. The Merchants National Bank and Boyles personally and as guardian, assigned their claims to different parties residing in the State of New York, for the purpose of collection by attachment of the funds in possession of the New York banks, but the real interest in the claims still remained in such original creditors respectively. When the bill was filed, and ever since, the Merchants National Bank was located at Chicago, and Boyles was then and ever since a resident thereof. The express company for many years has

maintained an office in Chicago, employed an agent residing there, and transacted all necessary matters there pertaining to its express business. The assignees of the claims and the express company severally began suits in attachment in the Supreme Court of New York on October 8 and 9, 1888, levying their attachments upon the funds of the Traders Bank on deposit in the New York banks.

On October 29, 1888, the receiver filed his petition in the Superior Court, praying that the express company, the Merchants National Bank, and Boyles, personally, and as guardian, should be required to discontinue all proceedings in the New York attachments, release all moneys, assets and property attached by them belonging to the Traders Bank; to pay to the receiver any money or assets they had received or might receive, directly or indirectly, from such proceedings; and that they might be enjoined from further interfering with the receiver and the assets to which he was entitled. No injunction was issued or ordered until March 4, 1889, when the final order was entered granting the relief prayed for in the petition.

The respondents named in the petition answered in October and November, 1888, and on March 4, 1889, amended their answers, alleging that on or about January 5, 1889, the receiver employed counsel to defend the attachment suits, and caused an appearance to be entered therein in the name of the Traders Bank, but, in fact, in behalf of the receiver; that about January 8, 1889, the receiver caused an undertaking to be executed and filed by the American Surety Company, of New York, in the said attachment suits, for the purpose of procuring the release of the funds which had been attached in said suits and that the same were thereupon released and delivered to the receiver, amounting to about the sum of \$25,000; that afterward, on January 23d and 29th final judgments were entered by the Supreme Court of New York in the attachment suits, in favor of the plaintiffs therein, severally, for the amounts of their claims; and that on February 1, 1889, the American Surety Company paid the express company \$9,036.52, the amount of the judgment so rendered in favor of the latter.

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The bonds given in each of the attachment suits recited the attachment; the appearance of the Traders Bank, that it was about to apply to the court for an order to discharge the same, and continued: "Now, therefore, the American Surety Company of New York * * * does hereby, in pursuance of the statute in such case made and provided, undertake that the defendant will, on demand, pay to the plaintiff the amount of any judgment which may be recovered in the action against the defendant," etc.

The facts stated in the amended answers to the receiver's petition are satisfactorily established, and, moreover, are tacitly admitted by appellees. Do they present a defense to the petition? *Sercomb v. Catlin*, 128 Ill. 556, is supposed by appellee to answer the question negatively.

The Superior Court of Cook County having appointed a receiver for the firm of Clapp & Davies, Sercomb, with notice of the fact, caused an attachment to be commenced in Washington, D. C., in favor of the Meriden Britannia Company, against Clapp & Davies, certain personal property of the defendants being seized by virtue of the writ. It was admitted that he could control the litigation, dismiss or continue the suit at his discretion. On petition of the receiver he was cited to show cause why he should not be attached for contempt in prosecuting the attachment. He demurred to the petition; the demurrer was overruled, and he elected to abide by the demurrer. He was then ordered to furnish proof to the court of having dismissed the suit, and in default thereof why he should not be attached for contempt. Failing to make proof of the dismissal, the receiver presented his petition praying that Sercomb show cause why he should not be attached for contempt, to which he also demurred, stood by his demurrer on its being overruled, and was ordered to be committed for contempt for refusal to dismiss the attachment. The object of the orders in that case were to prevent a judgment in another jurisdiction that would be final, not to set aside one already entered, and therein is the distinction between the two cases. We are not urged to depart from the rule in *Sercomb's case*, nor is it necessary to do so; but the doctrine

can not be pushed to the extent contended for by appellee without encroaching upon fundamental principles. The price of the advantages secured by the rule in that case is the exercise of that degree of superior diligence which intercepts the actions of the attachment creditor, and restrains the entry of final judgment in his behalf. The pending of the receiver's petition, without a restraining order, had no effect on the suits in New York. It could not be pleaded in abatement thereof (*Allen v. Watt*, 69 Ill. 655) much less in bar. Having allowed final judgment there appellee is now confronted with a provision of the national constitution, which requires full faith and credit to be given in each State to the public acts, records and judicial proceedings of every other State. Art. IV, Sec. 1. The earlier contention, that this section only required the admission in evidence in the courts of other States of such records, has long been abandoned, and judicial opinion is now uniform, that where the defendant is duly served with process, or appeared in the cause, the judgment is conclusive for all purposes, and is not open to inquiry upon the merits. If the judgment is conclusive in the State where it was pronounced, it is equally conclusive in all the courts of any other State. Even the Legislature of another State is powerless to authorize its courts to open the merits and review the cause, or to enact that such a judgment shall not receive the same faith and credit that by law it had in the State where it was rendered. *Christmas v. Russell*, 5 Wall. 290.

It may be true that any State can, by suitable legislation, remove that quality from its domestic judgments, which imports absolute verity, and leave all parties interested to inquire, by a new proceeding, into the merits of the case, without coming into collision with this constitutional prohibition. But in seeking for the faith and credit due in Illinois, to a New York judgment, where the defendant appeared in the cause, we need not inquire what effect is, or might be given in Illinois to its domestic judgments rendered under similar circumstances, because this section of the constitution does not give a judgment of one State merely like faith and credit in another State, as the domestic judgments of the latter State have in

U. S. Express Co. v. Smith.

its own borders. The question therefore is, what faith and credit would the judgment in question have in New York? If they can be questioned in that State, appellee has neglected to inform us in what court or tribunal it may be done. We must presume that an attempt to interfere with the judgment there would encounter the fate that a similar attempt by a New York receiver would meet here. That the attempt in our courts would avail nothing is manifest. *Rhawn v. Pearce*, 110 Ill. 350.

So far as the Traders Bank is concerned the judgments are final and conclusive and without any liability to revision, except upon appeal or writ of error to some court of the State of New York, having jurisdiction to correct errors of the court that committed them. Nor have they less effect against appellee. While he was not a party to them in name he in legal contemplation made himself a party thereto. He employed counsel to enter the appearance of the Traders Bank therein, and procured the surety company to enter into the obligation which secured the release, and surrender to himself of the fund detained by the attachment. That he thereby became a party to the suit and is estopped by the result of that litigation, seems to be plainly established by the authorities. *Bennitt v. Star Mining Co.*, 119 Ill. 9.

The action taken by the receiver in the cases while pending in New York was in reality a submission of his rights to that tribunal; a place of repentance is now sought in a renewal of the litigation. The reason most relied upon for securing this favor is, that the New York court did not consider the receiver's right to the fund. That, however, is no better reason than could have been given if his rights had been presented and considered, and the decision had been adverse to him. What might have been should have been presented, and the neglect to do so does not preserve the right to open the litigation in another forum. The principle of *res adjudicata* extends not only to questions of fact and of law, which were decided in the former suit, but also to the grounds of recovery or defense, which might have been, but were not presented. *Harmon v. The Auditor, etc.*, 123 Ill. 122.

The aspect of the case is not changed by the fact that appellee could not successfully have asserted his rights in the courts of New York. It is certainly the established rule in that State, that an assignee by operation of law can not supersede an attachment lien acquired by a creditor of the insolvent, although the assignment was made before the lien was acquired, the creditor and insolvent both being residents of the State where the assignment was effected. That appellee could not in any event have defended the New York suits successfully, is very plain. But that grows out of the fact that the rule in New York does not recognize the peculiar priority which courts of equity in Illinois endeavor to give to their receivers. *Hibernian Bank v. Lacombe*, 84 N. Y. 367. It is simply a difference in the ruling of the two jurisdictions. The same difference might appear in case a receiver appointed in New York should ask similar relief against an attaching creditor in Illinois. The prayer would be denied. *Rhawn v. Pearce*, *supra*.

Upon other questions the tribunals of different jurisdictions disagree. For example, the Supreme Court of this State holds that a mortgage securing a negotiable note is a chose in action, and when a foreclosure thereof is sought by a *bona fide* purchaser of the note before maturity, any defense will be admitted which would have been good against the mortgagee himself. *Olds v. Cummings*, 31 Ill. 188. The contrary doctrine prevails in the United States Courts. *Carpenter v. Logan*, 16 Wall. 271. After a *pro confesso* decree of foreclosure in the United States Circuit Court in favor of a *bona fide* holder of the note, secured by the mortgage, what would be the plight of a mortgagor applying to the Superior Court of Cook County to relieve the mortgaged property from the lien, on the ground that there was a defense to the note as against the payee, which the United States Court would not enforce against the purchaser? Manifestly his application would avail nothing, although if the question had not become *res adjudicata*, the relief would be granted. *Petillon v. Noble*, 73 Ill. 567. The case supposed, is parallel to that now in hand. The final analysis of appellee's argument pro-

duces the proposition, that as the New York court was governed by a rule that paid no respect to his supposed title, the judgment pronounced there, to which he was in law a party, should have no faith or credit here. If this is true no judgment is a finality so long as the courts of another State can be found to deny the principles upon which it was based. If the courts of this State may defy the constitutional prohibition in favor of receivers appointed here, the New York courts may do likewise in favor of receivers appointed there. Thus the provision for setting at rest questions once litigated is made a dead letter, and the wisest man can not tell when a law suit is ended. Not only is the Legislature denied the right to weaken the faith and credit due to judgments of other States, but any and all contrivances and makeshifts, any peculiar practice adopted by any court of law or equity, any favor to the rule of equality among creditors, having that effect, are equally forbidden. The leaning of equity toward equality in the distribution of insolvent estates is certainly commendable, but can not be encouraged at the expense of the supreme law of the land.

Sercomb's case is not authority for the doctrine that the appointment of a receiver operates *ipso facto* as a restraint upon domestic creditors, from pursuing the assets of the insolvent, which are beyond the jurisdiction of the appointing court, or that it is the duty of the court in all cases of that character to enjoin domestic creditors from such action. The first case is scarcely debatable, and as to the second I have no hesitation in saying that an injunction in such cases is entirely in the discretion of the court, and where it would operate to the injury of domestic creditors (leaving the fund to be entirely absorbed by non-resident creditors), all creditors should be left free to act; any other practice would conflict with the well known disposition to favor creditors of this State in preference to non-resident creditors. If these observations are sound, it is evident that the pendency of the receiver's petition and appearance of respondents thereto, imposed no restraint on appellants, and was no threat by the Superior Court (supposing a court capable of such a thing)

that an injunction would be granted, nor any notice that an order would be entered. The receiver after obtaining possession of the fund in dispute remained quiescent until the rights of the parties were adjudicated, when the victorious litigants appear in the Superior Court with the final order of a competent tribunal, are allowed by the court to set up the judgments, by sufficient pleadings, and are then told that the judgments are entitled to neither faith nor credit, because the receiver was intending to have the matter differently disposed of in the court which appointed him.

The case of the receiver derives no strength from his supposed want of qualification to become a party to the New York proceedings, as it is apparent from *Hibernian Bank v. Lacombe*, that he had a standing in court and could have presented and litigated whatever rights he had.

The position of appellants is not only consistent with *Sercomb v. Catlin*, but is supported by *Rhawn v. Pearce*, *supra*. The attempt in the latter case was made by an assignee *in invitum*, appointed by the Court of Common Pleas for the county of Philadelphia, Pennsylvania, to supersede an attachment levied in this State, by Pennsylvania creditors of the insolvent, after the appointment of the assignee. But it was held that the assignment had no operation in this State against the attachment, and after citing with approval *Hibernian Bank v. Lacombe*, *supra*, the court said: "We believe the rule established in New York and other States to be the better one, and one more likely to mete out justice to all parties in such cases." The court also held that it was of no moment whether the debt attached was constructively within the State of Pennsylvania or not, when the insolvency proceedings were instituted; that the fund was here and was liable to attachment under the laws of the State, and the trustees appointed in Pennsylvania could only take, subject to the remedies provided by law where the fund had an actual existence.

The decree is reversed and the cause remanded with directions to enter a decree in conformity with this opinion.

Reversed and remanded with directions.

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MORAN, J. With considerable doubt as to whether the receiver could bind the estate, or the court, by anything done by him in the matter in New York, without order of the court, I am, on the whole, disposed to concur in the foregoing opinion by Mr. Justice Garnett.

GARY, P. J. I concur in the result reached by the opinion of Mr. Justice Garnett, but for the reason that the principle of the case of *Sercomb v. Catlin* does not cover this case. That case, as well as those followed by it, is based upon no superior equity in the creditors represented or receiver appointed in the suit here, but upon the jealousy of the court against encroachment upon, or disregard of, its power, jurisdiction or authority. As was said by the Rhode Island court (13 R. I. 447), "We but echo the universal doctrine when we say that to the utmost limit of the jurisdiction and authority of this court, its orders shall neither be interfered with or disobeyed." In the case here, no fund in which the bank ever had any interest, or which the receiver could ever touch, is involved. In attachment suits in New York, brought by the appellants against the bank, a corporation, stranger to this suit, gave undertakings to pay the appellants the judgments they might obtain; that those undertakings were given at the instance of the receiver; that by means of them he was enabled to bring the fund attached, here that probably he must indemnify that corporation, furnish no grounds upon which a court here may, by indirection, discharge obligations voluntarily entered into in New York with full knowledge of all the circumstances, without compulsion, and not in the performance of any legal duty.

Among all the grounds stated in the treatises upon equity jurisprudence for the cancellation of contracts or agreements, there is no mention that for such a purpose, a bill founded upon the allegation that the complainant entered into the contract with the expectation that he would obtain the benefit of it, and not be bound by it, will lie. If the appellants had, pending the application for an injunction, prosecuted their suits to judgments and satisfaction out of the fund of the bank, they might, in following the logic of *Sercomb v. Catlin*,

have been compelled to make restoration. Bispham Eq., Sec. 404. But that fund the receiver has got into his possession, and he has no equity to substitute the means by which he obtained it, with full knowledge of the binding, legal obligation thereby incurred, to the place occupied by the fund before he interfered.

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OSCAR J. NELSON

v.

JOHN McEWEN.

Real Property—Party Wall Agreement—Conditions—Refusal to Abide by—Lien.

This court holds that the builder of a party wall, under an agreement with an adjoining proprietor that the same may be used by him upon payment of one-half the value thereof, is entitled upon bill filed to a decree for compensation for the same, and providing that the amount involved shall be a lien upon the premises of such proprietor using the wall but refusing to pay therefor.

[Opinion filed December 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding.

MESSRS. ADAMS & HAMILTON, for appellant.

MESSRS. ABBOTT, OLIVER & SHOWALTER, for appellee.

GARY, P. J. In 1883, these parties made a party wall agreement, under which the appellee erected a wall on the line dividing their premises. In 1885, the appellant used his side of the wall by building to it, and paid the appellee for it. At the same time the appellant erected the wall farther toward the rear of the premises. In 1888, the appellee used his side of the extension by building to it, but does not pay for it nor show any reason why.

The appellant filed his bill to have one-half of the cost of the extension built by him, and used by the appellee, declared a lien upon the premises of the appellee, as well as for a money decree. After an answer, the cause was referred to a master, who found the amount that ought to be paid, and then the court dismissed the bill for want of jurisdiction. The money decree is but the equivalent of a judgment at law, and unless the appellant is entitled to the lien he claims, the remedy would be only at law.

So much of the agreement as it is necessary to state is as follows:

“And this indenture further witnesseth: That the said party of the first part does hereby covenant, promise, grant and agree that the said party of the second part, his heirs and assigns, shall and may at all times hereafter have the full and free liberty and privilege of joining to and using the said partition above mentioned, as well below and above the surface of the ground and along the whole length or any part of the length thereof, any building which he or they or any of them may desire or have occasion to erect on the said lot of the said party of the second part, and to sink the joists of such building or buildings into the said partition wall to a depth of four inches, and no further.

“Provided, always, nevertheless, and on this express condition, that the said party of the second part, his heirs and assigns, as aforesaid, before proceeding to join any building to the said partition wall, and before making any use thereof, or breaking into the same, shall pay unto the said party of the first part, his heirs and assigns aforesaid, the full moiety of one-half part of the value of the said party wall, or so much thereof as shall be joined to or used as aforesaid, which value shall be the cost price at the time when such wall is to be used by the said party of the second part, as fixed, estimated and assessed by three disinterested persons mutually chosen as arbitrators between them.

“And it is further agreed by and between the said parties, that if either of the above parties, their or either of their heirs and assigns, shall at any time hereafter desire to build a

barn or extend the wall hereinbefore mentioned, the party so building may build and erect such wall or extension in the same manner as above specified, and the other party shall have the same liberty and privilege of joining and using such wall or walls so built and erected as aforesaid, on complying with the same conditions as are hereinbefore required by the said party of the second part, as to the manner of joining to the wall above mentioned and paying for the same. * * *

“And it is further mutually agreed between the said parties, that this agreement shall be perpetual, and at all times be construed as a covenant running with the land.”

The question whether the appellant is entitled to a lien, is not new in this State. It is settled in his favor by *Roche v. Ullman*, 104 Ill. 11, and *Gibson v. Holden*, 115 Ill. 199.

It is true that in the first case there had been an injunction to stay the completion of the building to the wall, and to dissolve it only, and Roche gave a bond to perform any decree that might be made. This bond added nothing to the jurisdiction of the court. Roche being a remote grantee of the party to the agreement, there would be no ground for an injunction to stay him from building to his own side of the wall, unless the covenant to pay were annexed to the land he had acquired.

The court below had made a decree that Roche was personally liable, and that Ullman was entitled to a lien upon the premises of Roche. This court had affirmed that decree, but at that time the statute did not require the appellate courts to give reasons for affirmances. The brief for the counsel for Roche insisted that neither he nor his land was liable. The Supreme Court affirmed the decree and whatever difficulty seems to have been found in assigning reasons, the judgment of the Supreme Court upon a case in point, is binding upon all subordinate tribunals. In truth the parties to such contracts do suppose that they are entering upon engagements which bind the land; that no insolvent holder can use the wall without compensation, because the agreement to pay prevents the use of the wall for the benefit of the land without pay, regardless of whose hands it may come to. It is intended to be, what the Supreme Court calls it, an

Goss & Phillips Mfg. Co. v. Suelau.

incumbrance; an incumbrance which the owner, by becoming owner and building, assumes to pay, as a vendee by accepting a conveyance reciting that he is to pay a mortgage, assumes it. In *Gibson v. Holden*, they repeat that the lot is charged with the burden of paying. Any money burden upon land is a lien. On the case made by the bill the appellant was entitled to a decree for compensation for half of the wall, and charging the same as a lien upon the premises of the appellee.

The decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion. What the merits of the case are will be ascertained by such proceedings.

Reversed and remanded.

Goss & Phillips Manufacturing Company

v.

William Suelau, by his next friend, etc.

Master and Servant—Negligence of Master—Personal Injury—Vice Principal—Contributory Negligence—Evidence.

In an action brought to recover from an employer for injury alleged to have been suffered by an employe through its negligence, this court holds in the absence of evidence going to show that the person injured was commanded to take the position in which he was, when hurt, that the verdict in his behalf can not stand.

[Opinion filed December 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ARBA N. WATERMAN, Judge, presiding.

Messrs. BOYSEN & LAWRENCE, for appellant.

Messrs. GOLDZIER & RODGERS and JOHN MCGAFFEY, for appellee.

GARY, P. J. It is not wonderful that jurors should per-

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mit their pity for misfortune to overcome their obligation to follow the evidence, when a court finds itself so reluctant to take from this unlucky boy the benefit of a verdict he has obtained.

There is an impulsive and not unnatural feeling that for injuries inflicted by powerful and dangerous machinery upon humble employes, even through their own want of forethought and caution, the proprietors, though without fault, should make some contribution. But if this is a duty it is of that class of moral duties, of imperfect obligation, of which the law can not take notice, and the performance of which can not be enforced.

The appellee was at work sawing wedges at a circular saw. His place, and a safe one, was at the front of the table in which the saw ran. The waste from the saw accumulated in a box on the side of the table, to the left hand of the operator. By a change in the apparatus a skilled workman could saw wedges faster when himself standing in the box. The boy being in fact in the box, stumbled upon the waste pieces there, and fell in such a manner that his leg came into contact with the saw under the table, and he has lost all beneficial use of his leg for life. His own testimony is that the foreman of the appellant told him to stand in the box while at work. The only corroboration of his testimony is that of another boy, that he saw the appellee in the box at work, and that the foreman was about the room at his own work, or going out and in. There is no reasonable foundation in the evidence for any supposition that the apparatus had been arranged for the operator to work from the box. The jury have specially found that the appellee was on some occasion warned by another workman that in the box was not a safe or proper place to stand; that the appellee had worked at the same saw before; that on a former occasion the foreman had told him to stand in front, and not in the box.

The foreman denied that he told the appellee to go into, or ever saw him at work in the box; another witness for the appellants testified that the appellee told him, that nobody told him to go into the box, and on a former trial the appellee testified that "when they emptied my barrel, I went into the

Millers' Nat. Ins. Co. v. Kinneard.

box and slipped and fell right under the saw." That as the wedges were sawed they were put into the barrel, appears from other testimony.

The only ground for a recovery is that the foreman ordered the appellee into the box, and this is so thoroughly disproved that the verdict can not stand.

A new trial should have been awarded, and the judgment is reversed and the case remanded.

Reversed and remanded.

THE MILLERS' NATIONAL INSURANCE COMPANY

v.

JOHN KINNEARD.

35	105
136	199
85	105
108	1206

Fire Insurance—Loss—Parol Promise by Adjuster to Pay—Recovery on—Compromise—Fraud—Evidence—Instructions.

1. The rule that parol testimony can not be received to contradict, vary, add to, or subtract from the terms of a valid, written instrument, is not infringed by proof of any collateral, parol agreement which does not interfere with the terms of the written contract, though it may relate to the same subject-matter.

2. In an action to recover, upon the parol promise of an insurance adjuster to pay a sum named within a given time, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff.

[Opinion filed December 24, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Messrs. HOYNE, FOLLANSBEE & O'CONNOR, for appellant.

Fraud must be clearly proved. "The evidence must be clear and cogent and must leave the mind well satisfied that the allegation is true." *Shinn v. Shinn*, 91 Ill. 477; *Adams v. Robertson*, 37 Ill. 45.

"The law in no case presumes fraud. The presumption is

always in favor of innocence and not of guilt. In no doubtful matter does the court lean to the conclusion of fraud. Fraud is not to be assumed on doubtful evidence. The facts constituting fraud must be clearly and conclusively established." Kerr on Fraud and Mistake, 384.

If acts can as well be attributed to honest motives and fair dealing as to dishonest motives, they will be attributed to the former. Walker v. Carrington, 74 Ill. 446.

When the genuineness of a signature to an instrument is established, it affords *prima facie* evidence that the contents of the instrument were known to the subscriber, and that it is his act, and the burden of proof is upon those who assert the contrary. Hartford Life Ins. Co. v. Gray, 80 Ill. 28.

"Where one can read, but does not, then to avoid the instrument he must show some artifice or trick by which he was prevented, or in other words the jury must be satisfied that the signature was obtained by fraud without negligence on the part of the signer." Wheeler & Wilson Mfg. Co. v. Long, 8 Ill. App. 463.

The opinion in the above case is by McAllister, P. J., and at the close of it he refers to Strong v. Linington, decided at the same term. 8 Ill. App. 436.

In the latter case the same judge says: "There is no doubt of the general rule, that if a party signing an instrument can read, it is his duty to read such instrument before signing, and if he does not and is not prevented by any fraudulent means, he can not be permitted to say, when called upon to respond to its obligations, that he did not know what it contained."

Mr. THOMAS BATES, for appellee.

An adjuster has authority to make a settlement with assured. Aetna Ins. Co. v. Maguire et al., 51 Ill. 342; Ill. M. Fire Ins. Co. v. Archdeacon et al., 82 Ill. 236; Home Ins. Co. v. Myer, 93 Ill. 276.

Upon the question as to what constitutes fraud, it would seem wholly unnecessary to cite authorities to this court. In appellant's brief counsel have stated the law most favorably

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for themselves, but, as we understand the law, if French, after having made the agreement and settlement with Kinneard which Laird, Williams and Kinneard positively swear he did make, and then afterward, with the design to deceive and defraud Kinneard, knowingly made false representations to induce him to sign a cunningly drawn writing, by which Kinneard was injured, then they are guilty of fraud and appellee should recover.

This and more than this was found to be true by the verdict of the jury, and is shown by the great preponderance of the evidence.

"A fraud in obtaining a note may consist of any artifice practiced upon a person to induce him to execute it when he did not intend to do such an act. Circumvention seems to be nearly, if not quite synonymous with fraud; it is not any fraud whereby a person is induced by deceit to make a deed or other instrument. The fraud or covin must relate to the procurement of the instrument." Woods v. Hynes, 1 Scam. 103; Latham v. Smith, 45 Ill. 25; Wilson v. Miller, 72 Ill. 616; Auten v. Gruener, 90 Ill. 300.

GARY, P. J. The appellee was insured against fire by the appellant upon property in Kansas. In July, 1885, it burned. The appellee immediately telegraphed:

"7 - 13, 1885.

Dated, OTTAWA, KAS., 13.

To W. L. BAENUM,

Sec'y Millers' National Insurance Co.

Total loss this date under policy seventeen hundred and sixteen.

JOHN KINNEARD."

To which, by letter, appellant replied:

"CHICAGO, July 14, 1885.

JOHN KINNEARD, Esq., Ottawa, Kas.

Dear Sir: Your telegram of the 13th inst., stating Forest Mills burned, just received. Fill out the inclosed blank fully, giving your total insurance at time of fire, full names of companies and division of the risk, and return to us by next mail. We will then arrange with the other companies so

that adjusters can meet you at same time and close the matter up as speedily as possible. Take care of the stock and anything left, same as if you had no insurance thereon. Read instructions on the back of our policy.

Also write us fully the cause or origin of the fire, when it occurred, and who first saw it.

Yours truly,

W. L. BARNUM, Sec'y."

The appellee replied the next day, but that letter contains nothing material to the questions for decision.

The appellants also wrote:

"CHICAGO, July 17, 1885.

JOHN KINNEARD, Esq., Ottawa, Kas.

Dear Sir: Our adjuster, Mr. French, will be in your place on the arrival of train from Kansas City, afternoon, Monday next, 20th inst."

Yours truly,

W. L. BARNUM, Sec'y.

Answer to my letter of 14th inst., *not yet received.*"

July 20, 1885, French, with adjusters for other companies, did arrive at Ottawa, and on the 22d he and the appellee signed a paper as follows:

"ADJUSTER'S AGREEMENT.

Know all men by these presents that it is mutually agreed between John Kinneard of Ottawa, Franklin County, Kansas, party of the first part, and the Millers' National Insurance Company, of Chicago, Illinois, party of the second part, witnesseth, that the total amount of loss or damage sustained by said party of the said first part by reason of the burning of the Forest mills and elevator, at Ottawa, Kansas, on the 13th day of July, A. D. 1885, is adjusted and determined to be the sum of eighteen thousand, two hundred dollars (\$18,200), as follows:

On Mill and Elevator Buildings.....	\$10,000.00
" Engine and Boiler House.....	161.86
" Mill and Elevator Machinery, Safe, etc.....	6,797.82
" Engine and Boiler and Connections.....	500.00
" Grain, Flour, Middlings, Sacks and Bags....	740.32

\$18,200.00

Millers' Nat. Ins. Co. v. Kinneard.

That the total amount of insurance thereon is seventeen thousand, five hundred dollars (\$17,500), as follows:

On Mill and Elevator Buildings.....	\$ 5,300.00
“ Engine and Boiler House.....	300.00
“ Mill and Elevator Machinery, Safe, etc.....	7,800.00
“ Engine and Boiler.....	1,000.00
“ Grain, Flour, Middlings, and Bags.....	3,100.00

\$17,500.00

The consideration of this agreement being the avoidance of future misunderstandings or litigations as to the amount of said loss or damage, it is further understood that this agreement is without reference to any other questions or matter of difference within the terms and conditions of policy number 1716, of said insurance company, covering thereon other than that of determining the amount of loss or damage, as above stated.

Witness our hands and seals at Ottawa, Kansas, this 22d day of July, A. D. 1885.

J. KINNEARD, [SEAL.]

MILLERS' NATIONAL INS. CO., [SEAL.]

By WM. B. FRENCH, Adj'r.

Signed and delivered in presence of

SILAS PIERSON.

The amounts stated in this paper were agreed upon between French and the appellee, after a good deal of negotiation, as a result of which, the testimony on the part of appellee, sufficient to make the verdict of the jury upon that part of the case final, is, that French, for the appellants, agreed, by parol, that they would pay the appellee \$3,872.19 in full for their share of the loss in sixty days.

On behalf of the appellee the jury were instructed:

“ If from all the evidence in this case the jury believe that on the 13th day of August, A. D. 1883, the defendant issued its policy of insurance to Kinneard and Laird, which said policy was afterward, with defendant's consent, duly assigned to plaintiff, and which covered property owned by the plaintiff in the sum of \$5,000; and if from all the evidence you further

believe that on or about the 12th day of July 1885, the property insured under said policy was destroyed by fire, and that defendant sent its adjuster to the scene of the fire, and if from all the evidence you further believe that said adjuster on or about the 22d day of July, 1885, agreed with the plaintiff as to the amount of said loss, and if the jury also believe from the evidence that there was a compromise settlement, and that it was agreed by the said compromise settlement said defendant would pay to said plaintiff the sum of \$3,872.19 within sixty days from that date, in full settlement, compromise and satisfaction of all claims and demands which plaintiff then had or might have had against defendant, under said policy, and that plaintiff agreed to accept the same; and if you further believe from all the evidence that such settlement and compromise was made, and that defendant's adjuster agreed with plaintiff that defendant would pay to plaintiff within sixty days from July 22, 1885, the sum of \$3,872.19 in full of all demands under said policy, and that plaintiff then and there agreed to accept the said sum \$3,872.19, to be paid as aforesaid, in full of all his demands against defendant, under said policy, then the jury are instructed that such settlement so made (if from the evidence you believe such settlement was made) is good and valid, and plaintiff would thereby be entitled to recover in this action the said sum of \$3,872.19, with interest thereon at the rate of six per cent per annum, from the 10th day of November, 1885, to the present time, unless you further believe from all the evidence that such adjuster had no authority to make such settlement."

In answer to special questions the jury have said that the "Adjuster's Agreement" was not read to the appellee, and that he was induced to sign it by fraud upon the part of the adjuster, but no such issue is presented by the instruction upon which the appellee obtained his verdict, nor does the record give any information as to what circumstances would, in the opinion of the jury, constitute, or be evidence of fraud on the part of the agents of the company, in dealings between an insurance company and the assured. It is quite probable that the jury were favorably inclined to the appellee.

The appellant insists the "Adjuster's Agreement" is the exclusive evidence of all agreements between French and the appellee, and the appellee seems to acquiesce in that proposition, unless he can avoid the paper by evidence that he was tricked into signing it. Substantially it is that issue of fraud which is fought out by the briefs here. This "Adjuster's Agreement" covered a single point, the amount of loss and insurance. The appellant's share of that loss is not stated in it. It is express that "it is without reference to any other questions or matter of difference within the terms and conditions of policy number 1716 of said insurance company, covering thereon other than that of determining the amount of loss or damage as before stated."

In legal effect it left the liability of the company to be determined by the provisions of the policy the company had issued. Nothing in it superseded those provisions. But they might be superseded by a parol agreement to pay an amount less than the sum named in the policy. *F. & M. Ins. Co. v. Chesnut*, 50 Ill. 111.

How, then, can a parol agreement which only takes the place of, or avoids the provisions of the policy, left untouched by the "Adjuster's Agreement" be said to vary that agreement? The rule that "parol testimony can not be received to contradict, vary, add to, or subtract from, the terms of a valid written instrument" (2 Tayl. Ev. 963), "is not infringed by proof of any collateral parol agreement which does not interfere with the terms of the written contract, though it may relate to the same subject-matter." *Ibid.*, 977. *Bradshaw v. Combs*, 102 Ill. 428.

The "Adjuster's Agreement" fixed the amount of loss of each class of insured and destroyed property, as well as the total loss, and also the insurance upon each class, as well as the total insurance; but the appellant's share of that loss, and whether they would ever pay it, were subjects left untouched. The parol agreement, as the jury have found it, fixed the amount to be paid by the appellant, and when it was to pay it.

With all the other policies in hand one could probably—not certainly, figure out from the "Adjuster's Agreement" the

appellant's share of the loss, but even that calculation might be questioned and disputed and become the subject of judicial investigation. It is not necessary to speculate upon the motive French had in putting into the " Adjuster's Agreement " the saving clause quoted. If he made the parol agreement, as the jury have found, it would be difficult to imagine an honest motive, and therefore the fact that he did put that clause in is an argument against the conclusion that he made such a parol agreement, which in contemplation of law, the jury considered.

The last clause of the instruction copied here is supposed to be justified by *Home Ins. Co. v. Myer*, 93 Ill. 271, and cases there cited; whether it is or not, it did no harm. If the jury had been required to find that French had authority, the letters of July 14th and 17th are conclusive.

" The matter " could not be closed so long as anything was left in dispute. In the shape the case takes, if these views are correct, the minor questions are immaterial.

The judgment is affirmed.

Judgment affirmed.

Judge MORAN does not concur in this opinion.

DEUTSCHER FRAUEN KRANKEN VEREIN

v.

HENRY C. BERGER.

Life Insurance—Mutual Benefit Association—Constitution—Provisions—False Statement as to Age—Evidence.

In an action by a husband, upon the death of his wife, to recover from a mutual benefit association, in which she was insured, a sum which, under its constitution, was then payable, the association contending that she falsely stated her age when she became a member, being in fact, upon that account uninsurable, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff.

[Opinion filed December 24, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Messrs. BANGS & BANGS, for appellant.

Messrs. GOLDZIER & RODGERS, for appellee.

GARY, P. J. The appellants are a mutual benefit association, and the wife of the appellee was a member. In the constitution of the association are these provisions:

“Section 2 of article 2. Any German woman between the ages of eighteen and fifty years may become a member of this association.

“Section 5 of article 2. When a member proposes a candidate she will give to the secretary a statement of the name, age and residence of the candidate, etc.

“Section 7, article 7. On the death of a member the relatives of the deceased shall at once receive the sum of \$100 for defraying the funeral expenses to be paid out of the treasury of the society.”

The wife having died, and the association refusing to pay to the appellee the \$100, he sued for it.

The defense was that the wife, when she joined the association in 1884, stated her age to be forty-eight, when in fact it was fifty-six. The exceptions upon which appellants rely are that the court sustained objections to the questions put by appellants to appellee when he was on the stand as a witness, as follows: “Where was your wife born?” “In what year was your wife born?” And that the court did not permit the appellants to put in evidence the certificate of the attending physician, made by him to the bureau of vital statistics of the city of Chicago. No general law by which such a certificate is required is referred to, and no ordinance of the city was put in evidence.

If an ordinance had been put in, one question would have been whether it required the age of the deceased to be stated in the certificate. Where his wife was born was immaterial, and it does not appear that the appellee had any knowledge

or information on that subject; and later in the case he did testify that he did not know what year she was born in, but supposed she was fifty-nine when she died, in 1887, and so told several persons.

The appellants had therefore the full benefit of all the information he could or would have given them in reply to the second interrogatory.

The judgment must be affirmed.

Judgment affirmed.

35	114
70	83

E. W. FARNHAM

v.

WILLIAM F. MONROE.

Landlord and Tenant—Lease—Rent—Guaranty—Assignment.

In an action to recover upon a written guaranty for payment of rent, this court holds, that in view of the terms thereof a subsequent assignment of the lease did not operate as a release of the guarantor.

[Opinion filed December 24, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Mr. WILLIAM FENIMORE COOPER, for appellant.

Mr. GRAHAM H. HARRIS, for appellee.

GARNETT, J. This is an action on a guaranty under seal, executed by appellant. The guaranty was written on the back of a lease of certain premises, made by appellee as party of the first part.

The lease, which was made and dated May 2, 1887, prohibited the lessees from assigning the same without the written consent of the lessor. On September 9, 1887, the lessor consented to the assignment to Bell & Co., on condition (as Monroe testified) that they would get somebody that was responsible to indorse the lease. Appellant, on the contrary,

Farnham v. Monroe.

testified that the negotiation was between himself and one Alvord, the agent of Monroe, and that Alvord told him Monroe desired a surety on the lease for Bell & Co. But whatever may have occurred in the negotiation between the parties (no fraud or imposition being shown) is of no importance, as Farnham did in fact execute the guaranty in these terms:

"For value received I hereby guarantee the payment of the rent and the performance of the covenants by the party of the second part in the within lease, as covenanted and agreed, in manner and form as in said lease provided. Witness my hand and seal this 9th day of September, A. D. 1887.

"E. W. FARNHAM. [SEAL]"

On the same day Monroe consented to the assignment to Bell & Co. The assignees took possession of the premises at once and remained in possession until about November 15, 1887, when they assigned the lease to one Robbins, who vacated the store December 31, 1887. The premises were not occupied in January, 1888, and appellee sued appellant for the rent of that month; judgment was rendered in favor of appellee, from which he has appealed.

The argument for appellee is based upon the theory that the contract of guaranty was for Bell & Co. only, and that as soon as they assigned the lease they were no longer liable for the rent, and consequently the grantor was released. We know of no rule of construction which can turn the guaranty from its plain import; all verbal negotiations are merged therein. It is a guarantee of the payment of the rent and performance of the covenants by the party of the second part in the lease. King & Coyle were the party of the second part. Bell & Co. were not parties to it. Farnham may have intended only to make himself responsible for Bell & Co.'s payment of the rent while they occupied the premises, but if he did he could have used very different words. There is no evidence which warrants the court in remodeling the contract; it must stand as it is written. Nor is the assignment by King & Coyle to Bell & Co., or by Bell & Co. to Robbins, any defense to an action on the guaranty. *Dietz v. Schmidt*, 27 Ill. App. 114. The judgment is affirmed.

Judgment affirmed.

WILLIAM HALL AND SIMEON F. HALL

v.

THE FIRST NATIONAL BANK OF EMPORIA.

Banks—Commission Merchants—Draft of Consignor—Promise to Honor—Course of Dealing—Evidence.

1. The construction of the parties to a contract as gathered from their acts will be regarded by courts in construing the same.

2. When a party agrees to accept and pay drafts for cattle bought and consigned to him, without requiring a bill of lading to be attached, he, and not the party who in good faith advances money on a draft, relying on such promise, takes the risk of the stock being diverted while in transit either by accident or design.

3. In an action brought by a bank to recover from a firm of commission merchants upon an alleged promise by them to accept and pay a certain draft drawn upon them by consignors of cattle, the same having been discounted by the plaintiff, this court holds, that the drawing of the draft in question was duly authorized; that the fact that the cattle against which it was drawn were diverted after shipment to another market cuts no figure in view of the fact that it did not appear there was any design in substituting other cattle, which sold for more than the draft called for, and declines to interfere with the verdict for the plaintiff.

[Opinion filed December 24, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

MR. E. F. MASTERSON, for appellants.

MESSRS. PECKHAM & BROWN, for appellee.

MORAN, J. This appeal is prosecuted to review a judgment rendered against appellants and in favor of appellee, in an action brought upon an alleged promise by appellants to accept and pay a certain draft drawn upon them by the firm of Greer & May, and which had been discounted by appellee.

The evidence tended to show that Greer & May, who were cattle buyers, operating in and around Emporia, Kansas

Hall v. First Nat. Bank of Emporia.

made an arrangement with the appellants, by which they were to sell such stock as should be shipped to the Chicago market for said Greer & May, on certain terms as to commissions. Being about ready to make shipments, Greer & May wrote to appellants, on August 10, 1886, as follows:

"Please write the First National Bank of Emporia that you will pay our draft for any cattle we buy. I expect we will ship five or six loads of cattle the first of next week. There has not been any cattle shipped from here yet. Will commence to run soon. We think we will get you a good many cattle from here. The cattle men do not like present prices, but the cattle will have to go soon.

"Respectfully, GEEER & MAY.

"Greer."

On August 13th, after the receipt of that letter, appellants telegraphed appellee as follows:

"UNION STOCK YARDS, ILL., 8-13, 1888.

"We will honor Greer & May's draft for cost of cattle and hogs consigned to us.

"HALL BROS. & Co."

Between the date of said telegram and the drawing of the draft in suit, Greer & May drew some seven drafts on appellants, and appellee advanced money on said drafts to pay for cattle to be shipped to appellants, which drafts were all paid by appellants on presentation. The evidence also tended to show that three of these drafts had on their face the words, "drawn on tel. 8-14," and the draft in suit was drawn in the same way, and appellee advanced money on the credit of it to Greer & May to pay for the cattle consigned to appellants. By some confusion in shipping the cattle, the stock that was intended by Greer & May to be sent to appellants, at Chicago, were sent to and sold at Kansas City, and stock that was intended by them for Kansas City came through and were received and sold by appellants. Appellants refused to pay the draft, and they contend that the telegram authorized the payment of only one draft; that the word "draft" was used instead of "drafts," and that was so done advisedly. The question of whether the telegram authorized the drawing of

the draft in question when considered in the light of the letter in response to which it was sent, and the subsequent course of dealings between the parties, and all the circumstances of the case, showing the construction which the parties themselves put on the telegram, was left to the jury by the trial court, under correct instructions, and the jury determined that question against appellants' contention, and, as we think, rightfully. The construction of the parties, as gathered from their acts, will be regarded by the courts in construing the contract. *Vermont St. M. E. Church v. Brose*, 104 Ill. 206.

Appellants contend that the cattle against which the draft in question was drawn, never reached them, but were diverted to other parties, and an inferior lot of cattle substituted and shipped to them.

It is true that the cattle against which the draft was drawn did not reach appellants for sale, though it is by no means clear that there was any design in the substitution of the cattle which were sent to appellants, and it appears that the proceeds of the cattle which appellants sold exceeded the amount of the draft, and that no other than appellee has made any claim to the proceeds, so that, as far as this claim is concerned, appellants have suffered no injury by the diversion of the cattle intended to be shipped, and which were, in fact, actually consigned, and started on their journey to appellants.

But it being established that the holder of this draft, the bank, knew nothing whatever of the diversion of the consignment, and that the money furnished to Greer & May on the credit of the draft went to pay for the cattle which were consigned to appellants, it is not perceived how the fact that the consignment was, while in transit, diverted to another consignee, could affect appellee, it being a holder of the draft for value. The consignor has the legal right to change the destination of goods put in possession of a carrier, to be delivered to a designated consignee (*Lewis v. Gal. & Chi. U. R. R. Co.* 40 Ill. 281); and where a party agrees to accept and pay drafts for cattle bought and consigned to him, without requiring a bill of lading to be attached, he, and not the party who in

Kaufman v. Lindell.

good faith advances money on the draft, relying on such promise to accept and pay, takes the risk of the stock being diverted while in transit, either by accident or design. Appellants requested the court to give to the jury, instructions, some twenty in number, and error is assigned on such refusal, as well as on the instructions given by the court.

It would serve no useful purpose to discuss these various instructions in detail. We have examined them, and considered counsel's contentions in regard to the action of the court thereon, and we are of opinion there was no error committed by the court, either in giving or refusing instructions.

Neither is there, in our opinion, any error available to appellant in this record, in regard to the form of the verdict, the amount of damages, or the rejection or admission of evidence. We find no error of law, and the verdict was warranted by the evidence, and in our opinion the judgment is upon the whole record just, and will therefore be affirmed.

Judgment affirmed.

EUGENE C. KAUFMAN

V.

ALFRED LINDELL.

Negotiable Instruments—Note—Surety—Suit by Indorsee—Evidence.

In an action by the indorsee of a note against the indorser thereof, the contention of the defendant being that an agreement to renew was not carried out, for the reason that a third person, instead of signing the same as surety, executed his individual note for that purpose, this court holds, that in view of the evidence the verdict for the defendant can not stand.

[Opinion filed March 24, 1890.]

APPEAL from the Superior Court of Cook County; the
HON. KIRK HAWES, Judge, presiding.

Messrs. BLANKE & CHYTRAUS, for appellant.

Messrs. CLIFFORD & SMITH, for appellee.

GARNETT, J. This is an action of assumpsit, brought by appellant against appellee as indorser of a promissory note, made by L. P. Nelson for \$600, dated August 29, 1884, payable thirty days after date to the order of Alfred Lindell & Co., with eight per cent interest. The case was tried before the court and a jury, but no instructions were asked or given. There was a verdict and judgment for the defendant.

The facts are, that about January 1, 1884, Nelson was indebted to Alfred Lindell & Co., a firm then composed of Alfred Lindell and Fred Unkerfeld, in the sum of \$600. To secure payment of the amount Nelson executed and delivered to them his note, payable to Alfred Lindell & Co., in ninety days after that date. The payees indorsed the note; it was taken by Unkerfeld to Hangan & Lindgren, bankers, in Chicago, for discount, but the paper was declined, as they did not consider it good security without another name. Unkerfeld then went to one Veeder and succeeded in persuading him to sign or indorse the note. Whether he signed as a maker, or wrote his name on the back of the note as an indorser, is not entirely clear from the evidence. The payees then indorsed and sold the note to Hangan & Lindgren. When it matured there was an agreement for a renewal, in pursuance of which Nelson executed the note sued on, and the defendant, under the name of Alfred Lindell & Co. (the firm having been previously dissolved by the withdrawal of Unkerfeld) indorsed it. The latter note was taken (by whom does not appear) to Hangan & Lindgren, and left with them, but they refused to accept it as a renewal of the first note without Veeder's signature. It was then arranged between Hangan & Lindgren and Veeder, that the latter should execute his own note and leave it as security for the new Nelson note, which was accordingly done. After the maturity of the new note of Nelson it was sold and delivered, together with Veeder's note, by Hangan & Lindgren to Kaufman. At the time of maturity of the new note Nelson was, and ever since has been insolvent, and a suit against him during that time would have been unavailing.

Lindell insists the agreement to renew was not carried out,

Bailey v. Partridge.

as Veeder did not sign the note sued on. But we think after a careful review of the evidence that Veeder's signature to the first note was obtained at the request of, and to accommodate the payees. When Veeder signed, Nelson had delivered the note to the payees, and had nothing more to do with it. Even assuming he signed the first note as maker, if it was done to accommodate the payees, he was simply their surety, and it was their duty to indemnify him against liability. And if he had joined in the execution of the second note, his relation to Lindell would not have been different; he would still have been a mere surety between himself and Lindell. No benefit, therefore, could have been derived by Lindell from Veeder's execution of the second note, and no harm has befallen him from his failure to sign.

The judgment is reversed and the cause remanded.

Reversed and remanded.

35 121
205s 1101

JOEL J. BAILEY ET AL.

V.

C. W. PARTRIDGE ET AL.

Sales—Payment to Traveling Salesman—Embezzlement—Evidence.

1. Where a plaintiff introduces letters of the defendant to prove certain facts, he is bound to admit declarations therein which make against him, as well.

2. In an action brought to recover the value of goods sold and delivered a check in payment having been given a salesman of the plaintiffs, the same or its proceeds never having been turned over by him to them, this court holds that such delivery was properly made, and was equivalent to delivery to the plaintiffs, and declines to interfere with the judgment against them.

[Opinion filed December 24, 1889.]

IN ERROR to the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. D. BLACKMAN and FLOWER, SMITH & MUSGRAVE, for plaintiffs in error.

MESSRS. BRANDT & HOFFMAN, for defendants in error.

GARNETT, J. This is a suit brought by plaintiffs in error against defendants in error, to recover the value of goods sold and delivered to defendants. At the conclusion of the plaintiff's evidence the court instructed the jury to find for the defendants.

The facts are that in August, 1883, one Holmes was a traveling salesman in the employ of plaintiffs, whose place of business was in Philadelphia; that in the early part of that month Holmes sold and delivered goods of the plaintiffs to defendants, a firm carrying on business in Chicago, and at his request the defendants then made and delivered to Holmes their check on the Continental Bank of Chicago, for the purchase price, payable to Joel J. Bailey & Co., or bearer. The check was never given to plaintiffs, nor have they ever received the proceeds thereof, or any payment for the goods. No evidence was introduced of payment or non-payment of the check, or of what was done with it, nor was it produced on the trial to be surrendered to defendants.

By the contract between plaintiffs and Holmes he had no authority to receive payment, but no evidence was given of notice to defendants of his want of such authority. "When the principal intrusts the agent with the possession of the goods to be sold, and authorizes him to sell and deliver them, authority to receive payment therefor will be implied, and a payment made to the agent at the time of the sale and delivery, or as part of the same transaction, will be binding upon the principal—of course, in the absence of any knowledge on the part of the purchaser that the agent was not authorized to receive payment." *Mechem on Agency*, Sec. 338.

The delivery of the check to Holmes was in the usual course of business, and was equivalent to a delivery of it to plaintiffs. If it had been delivered to the plaintiffs, they could not recover without proving non-payment, and that, as we have seen, they neglected to do. The only proof of the delivery of the check to Holmes consisted of statements in letters of defendants, which plaintiffs introduced in evidence

Wheeler v. Wheeler.

as admissions of other facts. By the ruling of the court the letters were treated as conclusive evidence of the fact of delivery of the checks. The statements were not in themselves unreasonable, or improbable, nor was there anything in the nature of the transaction or in the evidence tending to impeach them. The doctrine in such cases is that the admission, with the accompanying declaration, which serves as an answer to the admission, is to be received in evidence, and the answer is conclusive. *Howell v. Moores*, 127 Ill. 70; 1 *Roscoe's Crim. Ev.* (8th Ed.), 54-55; *Roberts v. Gee*, 15 Barb. 449; *Corbett v. The State*, 31 Ala. 329; *Arnold v. Johnson*, 1 Scam. 196.

There was no error in the instruction. The judgment is affirmed.

Judgment affirmed.

ELIZABETH WHEELER ET AL.

V.

ELIZABETH WHEELER, EXECUTRIX.

Administration—Probate of Will—Bill to Set Aside.

1. This court declines to interfere with a decree dismissing a bill filed to set aside the probate of a will fifteen years after the same occurred.

2. The word "absent" with reference to a person in a statute other than of limitation, must be taken to mean one who has been present, not a non-resident.

[Opinion filed December 24, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding.

Mr. MASON B. LOOMIS, for appellants.

Mr. M. J. DUNNE, for appellee.

GARY, P. J. This was a bill in chancery, filed under Sec.

7, Ch. 148, R. S., by non-residents of this State, to set aside the probate of a will, and the only question is whether they have eternity to do it in. The statute provides that such a bill may be filed within three years after probate, and that persons "absent from the State" have the like period after the removal of their disabilities. Generally in statutes of limitation similar language has been held to include non-residents, as well as residents temporarily absent; but this statute is not a limitation law. It creates a remedy not before existing, and the lapse of time need not be pleaded to make it a bar. *Luther v. Luther*, 122 Ill. 558. The word "absent" conveys the idea of a temporary condition, a cessation of, and probability or possibility of returning, presence. Very little authority should be required to prevent a strained construction that might lead to serious consequences from too long delay in settling estates (*Ibid.* 566); but that little is found in *Snoddy v. Cage*, 5 Texas, 106, and *Buchanan v. Rucker*, 9 East. 192, holding that "absent" must be taken only to apply to persons who had been present. And see *Hyman v. Bayne*, 83 Ill. 256.

The bill in this case was filed more than fifteen years after the probate. The demurrer to it was properly sustained, and the decree dismissing the bill is affirmed.

Decree affirmed.

JACOB BEIDLER

v.

CHARLES H. DOUGLAS ET AL.

Creditor's Bill—Property in Hands of Third Persons—Judgment and Execution—Failure to Prove—Admission.

Upon a creditor's bill, seeking to reach property in the hands of third persons, alleged to belong to a judgment debtor, no proof being offered by the complainant in support of the allegations therein of the recovery of a judgment, and the issuance of an execution and the return thereof unsatis-

Beidler v. Douglas.

fied, it being claimed by him that the existence thereof was admitted on the hearing by the counsel for the defendants, no such admission being found in the record, this court declines, in view of the absence of proof touching these points, to interfere with the decree for the defendants.

[Opinion filed December 24, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Messrs. ARTHUR B. CAMP and GRANT NEWELL, for appellant.

Messrs. TENNEY, HAWLEY & COFFEEN and A. W. UNDERWOOD, for appellees.

MORAN, J. Appellant filed a certain bill against the appellees, and on the hearing in the court below on the bill, answers and proof, the court dismissed the bill for want of equity.

The bill alleges the recovery of a judgment against appellee Douglas, and that an execution had been issued thereon, and had been returned unsatisfied, and seeks to reach in the hands of the other appellees, property which it was alleged belonged to said Douglas. The answer of all the defendants except Douglas, traverse all the allegations in the bill not specifically answered, admitted or denied, and they nowhere admit the recovery of the judgment against Douglas, or the issuing or return unsatisfied of any execution against him.

On the hearing, appellant offered no proof of the existence of such a judgment or of the issue or return of any execution thereon. Appellant claims that the existence of the judgment and execution were admitted on the hearing, by the counsel for appellees, but the part of the record to which counsel refer in the briefs, contains no such admission, and we have searched throughout the record in vain to find it. It was indispensable to the maintenance of appellant's bill that he should prove every material fact alleged therein which was not admitted by the answers, whether the same was denied by answer or not. Proof of the existence of the judgment and the

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return of the execution unsatisfied, was essential, as those are jurisdictional facts, and unless they are made to appear in some manner the court is without authority to grant any relief upon a creditor's bill. *Moshier v. Meek*, 80 Ill. 79; *Dormeuil v. Ward*, 108 Ill. 216.

As we have seen, these necessary facts were not admitted by the answers, nor shown by the evidence, and on the ground of the failure of the proof to sustain the allegation of the bill in that regard, and without reference to any other question made in the case, the decree of the court below dismissing the bill must be affirmed. *Dooley v. Stipp*, 26 Ill. 89; *Heacock v. Durand*, 42 Ill. 230.

Decree affirmed.

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ZEMACH DAVIDSON

v.

NAPOLEON PROVOST.

Mechanics' Liens—Payment—Architects' Certificates—Death of Member of Firm of—Evidence.

1. The recognition by an owner and building contractor of the surviving member of a firm of architects, upon whose certificates payments were to be made, as superintendent and architect, is binding upon both.

2. Upon a bill filed by a building contractor to enforce a mechanic's lien for an amount claimed to be due, this court holds as erroneous the refusal of the trial court to admit upon the part of the defendant, evidence going to show that the plaintiff had not followed the plans and specifications whereby he was injured, and that the decree for the plaintiff can not stand.

[Opinion filed December 24, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Mr. ISRAEL COWEN, for appellant.

Wherever there is allegation of power for a mere private

purpose, the concurrence of all intrusted with the power is necessary to its due execution. *Morse on Arbitration*, p. 162; *Green v. Miller*, 6 Johns. 39; *Patteson v. Leavitt*, 4 Conn. 50; *Russell on Arbitration*, 3d Ed. p. 207.

In *Bannister v. Read*, 1 Gilm. 102, an award was held void, because made by only two of the three arbitrators, to whom the reference was made. See, also, *Watson on Awards*, 8; *Thomas v. Harroll*, 1 Sim. & Stu. 524.

In *Towne v. Jaquith*, 6 Mass. 46, the court held the award void, where but two of three made the same, because of the necessity of giving effect to private confidence.

The same distinction between matters of public concern and private confidence is made in *Green v. Miller*, 6 Johns. 39 and *Cope v. Gilbert*, 4 Denio, 347.

This position is sound enough to go further than we purpose to, but it at least should have enabled the defense to put in a defense, and the failure to allow appellant to do so is of itself a strong recommendation for a reversal.

In *Tetz v. Butterfield*, 54 Wis. 242 *et seq.*, it was held that when the plea set forth that improper and inferior materials had been used by the plaintiff, and that the architect had wrongfully certified satisfaction, and in other respects failed to discharge his duty as an architect, thus perpetrating a fraud upon the rights of the defendants, that the defendant was entitled to show in evidence all facts tending to show bad faith on the part of the architect in superintending the building.

It is also well settled that the architect can not change the terms of the specifications without special authority. *Adlard v. Muldoon*, 45 Ill. 193.

Neither the builder nor the architect can change the specification or deviate therefrom, substantially, even by substituting what is claimed to be better work or material, without authority, in accordance with the contract. *Idem.*

There is a mistaken impression prevailing as to how far the architect's certificate concludes the owner.

The general rule seems to be that the certificate of an architect, whose approval is required before any payment is

due, can not dispense with the performance of any substantial part of the contract. It may be binding as to the fact, whether the work certified to was done in a workmanlike manner, or of proper materials of the kind required. *Bond v. Newark*, 4 C. E. Gr. 376.

Mr. HENRY MEISELBAR, for appellee.

GARNETT, J. Appellant and appellee made a contract by which Provost agreed "to build, finish and complete a building at No. 59 Wilson St. in a careful, skillful and workmanlike manner, to the full and complete satisfaction of Ackerman & Smith, architects and superintendents, and have all work fully completed on or before April 25, 1886, * * * so as to fully carry out the designs of said work as set forth in the accompanying specifications, and the plans and drawings therein especially referred to, the same being made a part of said contract;" Davidson reserving the right and privilege of making any alterations in the designs; and he agreed to pay to Provost \$7,050, said amount to be paid in installments; fifteen per cent to be paid upon completion of contract, payable on architects' certificates.

Soon afterward Smith, one of the architects named, died, but work on the building proceeded under the superintendence of Ackerman. He issued the certificates for payments to the contractor, and they were paid without objection by appellant, excepting a certificate for \$450 for extra work, and the final certificate for \$1,000 for labor and materials provided under the original contract. Provost filed his bill in the Superior Court to enforce a mechanic's lien for the amounts so remaining unpaid; a decree was entered in his favor for \$1,930.45.

Appellee contends that the certificates of Ackerman are conclusive, while Davidson insists that the death of Smith terminated the power to issue them so as to bind him. The general rule governing in such cases is stated in *Mechem on Agency*, Sec. 251: "As has been seen, a power confided to two or more private agents must ordinarily be exercised by all

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of them jointly; the death of one of them, therefore, where the authority is joint, renders the further execution of the agency impossible and it is therefore terminated. Where, however, the agency is joint and several, the death of one agent does not terminate it."

See, also, Morse on Arbitration, 162; Sugden on Powers, 145 146; 1 Wait's Actions & Def. 291; Hartford Fire Ins. Co. v. Wilcox, 57 Ill. 181; Robson v. Drummond, 2 B. & Ad. 303; Rowe v. Rand, 111 Ind. 210.

The recognition by both parties, of Ackerman as superintendent and architect, after Smith's death, takes the case out of the general rule. If Davidson intended to confine his authority within narrower bounds than those the contract prescribed for Ackerman & Smith, he should have notified Provost of his intention, instead of encouraging him to rely upon that interpretation of his acts which would be commonly given them. The effect of the certificate, however, is not as absolute as indicated by the rulings of the court on the hearing of the case. The defendant produced witnesses, by whom he proposed to prove that the plans and specifications had been disregarded by Provost in material respects; that certain parts of the work and materials had been wholly omitted, and alterations made in other particulars, and that by reason thereof appellant suffered damages to the extent of \$2,000.

The court rejected the evidence, and defendant excepted to the ruling. The exception is well taken. If the evidence had been admitted it might have shown such gross dereliction of duty on the part of the architect as to raise a presumption of fraud or mistake in the issuing of the certificates. The importance of this point is emphasized by the admission of the architect in his testimony, that he never looked to see whether certain parts of the specifications had been complied with. For this error, which is the only one we think well assigned, the decree is reversed and the cause remanded.

Reversed and remanded.

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CHRIS. CORCORAN

v

CELIA PONCINI.

Trespass—Assault and Battery—Damages—Evidence—Testimony of Child—Criminal Law.

1. In an action of trespass, brought for the recovery of damages for injuries suffered by reason of an assault and battery, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff.

2. In the case presented it is *held*: That the refusal to allow a boy ten years old to testify was proper, no statement having been made as to what was expected to be proved by him, and no question having been propounded to him from which the same could be inferred.

[Opinion filed December 24, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

MESSRS. GARDNER, McFADON & GARDNER, for appellant.

The court below also erred in refusing to allow Bernard Brady to testify on behalf of defendant.

The evidence showed he was ten years old going on eleven, believed in a God and in a hereafter, and that he would be punished hereafter if he committed perjury in this case.

In *Noble v. People*, Breese, p. 54, the court says: "I conceive the law to be that all persons who believe in the existence of a God and a future state, are on this account good witnesses."

In *Draper v. Draper*, 68 Ill. 17, it was held that a child of nine years of age was competent, who on *voir dire* testified that she understood the nature of an oath, and that if she didn't tell the truth she would go to hell. On page 19 the court said: "This is believed to be within the most rigid test as to the knowledge necessary to permit persons to testify." The boy was confused by the subsequent examination of the

Corcoran v. Poncini.

court and failed to answer some of the questions. Under the law of Illinois, the witness being competent, it is to be presumed that his testimony would have been material.

Messrs. JONES & Lusk, for appellee.

GARNETT, J. This is an action of trespass brought by appellee against appellant to recover damages for assault and battery. The jury rendered a verdict for \$150 upon which judgment was rendered, and appellant now asks for a reversal. He says the verdict was against the evidence. The plaintiff and her sister testify positively to the striking. The only positive evidence to the contrary is that of the defendant himself. He called four other witnesses of the occurrence, only one of whom testified that she saw the whole transaction and she goes no further than to say that she did not see Corcoran strike the plaintiff. No one of the other three stated whether he struck her or not.

We have carefully examined the evidence, and find that a reversal on this ground would not be consistent with the rule that a verdict should remain undisturbed unless it is manifestly against the weight of the evidence.

The refusal of the court to permit Bernard Brady, a boy ten years old, to testify, is another point urged by appellant. The only question put to the proposed witness relates to his belief in God and a future life and his comprehension of the nature of an oath. No statement was made by counsel as to what he intended to prove by the witness, and as no question was propounded to him from which it can possibly be inferred that he knew anything of the material facts, the appellant's case can not be said to have suffered from the ruling. *Gaffield v. Scott*, 33 Ill. App. 317. No error is perceived in the giving or refusing of instructions. The judgment is affirmed.

Judgment affirmed.

JOSEPH B. DITTO AND CAROLINE C. HITCHCOCK

v.

LOUIS L. SHARPE.

Attachment—Bill of Sale—Possession under.

This court declines to interfere with the judgment of the trial court wherein it finds that certain goods, when attached, were rightfully in the possession of another under a bill of sale.

[Opinion filed December 24, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

Messrs. ERNEST HITCHCOCK and EDWIN BURRITT SMITH, for appellants.

The Supreme Court of this State has consistently and uniformly held in an unbroken current of decisions from 1 Scammon down, that "all conveyances of goods and chattels, where the possession is permitted to remain with the alienor or vendor, are fraudulent *per se* and void as to creditors and purchasers unless the retaining of possession be consistent with the deed." "The vendor's possession * * * is a fraud *per se* and can not be rebutted by testimony of fair intention." Thornton v. Davenport, 1 Scam. 296, 298; Rhines v. Phelps, 3 Gilm. 456; Reed v. Eames, 19 Ill. 595; Thompson v. Yeck, 21 Ill. 73; Dexter v. Parkins, 22 Ill. 146; Ketchum v. Watson, 24 Ill. 591; Thompson v. Wilhite, 81 Ill. 356; Lefever v. Mires, 81 Ill. 456; Johnson v. Holloway, 82 Ill. 334, 336; Ticknor v. McClelland, 84 Ill. 472; Allen v. Carr, 85 Ill. 388; Richardson v. Rardin, 88 Ill. 129; Greenebaum v. Wheeler, 90 Ill. 298; Rozier v. Williams, 92 Ill. 187; Lawson v. Frank, 108 Ill. 507; Harts v. Jones, 21 Ill. App. 150.

There was no sufficient delivery of the property in question here to pass title as against the attaching creditor.

A sufficient delivery is—

Ditto v. Sharpe.

“A change of possession which will protect the title of the purchaser as against creditors must consist of a complete surrender and discontinuance of the exercise of acts of ownership by the vendor, and the assumption of such acts on the part of the vendee.” Wait, Fr. Con., 2d Ed., p. 362.

Debtor must cease from apparent as well as real ownership. *Topping v. Lynch*, 2 Rob. (N. Y.) 488; *Steel v. Benham*, 84 N. Y. 638.

Words and inspection not enough. *Crandall v. Brown*, 18 Hun (N. Y.), 461.

Change of possession must be continuous. Wait, Fr. Con., 363.

Concurrent or joint possession not sufficient. *Id.* 365; *Bump*, Fr. Con., p. 137.

“Change of possession required by this rule is an actual and not a merely constructive change. An actual change, as distinguished from that which by the mere intendment of the law follows the transfer of the title, is an open, visible, public change, manifested by such outward signs as render it evident that the possession of the owner has entirely ceased.” *Bump* on Fr. Con., 112.

“The delivery must be actual, and such as the nature of the property and the circumstances of the sale will reasonably admit, and such as the vendor is capable of making. A mere symbolical or constructive delivery when a real one is reasonably practicable is of no avail.” *Id.* 133.

“There must be some open, notorious or visible act clearly and unequivocally indicative of delivery and possession, such as putting up a new sign, or any other reasonable means which would impart notice to a prudent man that a change had taken place. The act must be so open and manifest as to make the change of possession apparent and visible. The change of possession must be such as is observable without inquiry.” *Id.* 139; see *Garman v. Cooper*, 72 Pa. St. 32.

These principles are sustained by the Illinois cases. See *Ticknor v. McClelland*, 84 Ill. 474; *Allen v. Carr*, 85 Ill. 388; *Harts v. Jones*, 21 Ill. App. 150, and other cases cited.

Messrs. CONDEE & ROSE, for appellee.

"Where a debtor, in failing circumstances, by way of preference, makes a bill of sale of his stock in trade, household furniture, etc., to one of his creditors, and is thereupon employed by such creditor as his head clerk, or agent, to manage the business in the name of his principal, the purchaser, and at the same time such debtor retains possession of the household furniture, under a lease from the purchaser, such a transaction, though calculated to raise suspicion of collusion, is not conclusive of fraud and may be explained; and when, in such a case, a jury have found a verdict in favor of the purchaser and there was evidence warranting such a verdict, it will not be disturbed, even though the court might have differed in opinion with the jury, had they been sitting in the first instance, as tryers of the case." *Powers v. Green*, 14 Ill. 386.

"Where a vendee employs his vendor as a clerk to sell goods, although the fact may excite suspicion, it is not *per se* fraudulent, and may be explained." *Warner v. Carlton*, 22 Ill. 415.

In each of the foregoing Illinois cases, the vendee retained the vendor himself as his clerk, or agent, and the court say it was not fraudulent *per se*, but could be explained.

To the same effect we cite *Godechaux v. Mulford*, 26 Cal. 324; *Billingsby v. White*, 59 Penn. St. 466.

"It is well settled that the employment of the vendor in a subordinate capacity is only colorable and not conclusive evidence of fraud. Certainly, no stronger rule ought to be adopted against the employment of the mere servant of the vendor." *Gray et al. v. Sullivan et al.*, 10 Nev. 416.

"The essential fact to be proved, under the circumstances of this case, was, whether or not there was an actual and continued change of possession. If this was sufficiently shown, then the mere fact of the re-employment of the clerk of the vendor by the vendees would not render the sale invalid." *Ivancovich v. Stern*, 14 Nev. 341.

As to the hiring of the clerk of the vendor by the vendee, and as to the failure to take down the sign of the vendor, we further quote from the following authorities:

Ditto v. Sharpe.

“Where one made an honest purchase of a store of goods, and received the actual and exclusive possession of it, but continued it in the same place, and allowed the signs and other outward appearances to remain unchanged, and put in to conduct it his own son, who had some time before been clerk in the same store, suffering the vendor, who lived in part of the house, to be about the store assisting in its business, these circumstances did not make the sale voidable by the creditors of the vendor or require its condemnation as a matter of law.” *Hugue v. Robinson*, 24 Penn. 9.

“If one who has purchased a stock of goods in a shop occupied by the vendor, permit the signs of the vendor to remain over the door, that fact is evidence that the vendor remained in possession after the sale, and is so far evidence of fraud; but it admits of explanation.” *Seary v. Dearborn*, 19 N. H. 351.

To the same effect is *Hall v. Parsons*, 15 Vt. 358.

Per Curiam. Appellee took from one Hall a bill of sale of certain articles, and left Hall in possession of them. After a time Hall left the city and the evidence tended to show, and the court below found, that appellee took possession of the articles under the bill of the sale before the writ of attachment under which appellants claim the goods was levied, and that at the time of said levy appellee was in possession of said goods by his custodian.

This finding of the court is controverted by appellants, but after an examination of the record and consideration of appellants' points and authorities, we are unable to concur in their contention. No fraud in fact is imputed to appellee, and whether he had taken legal possession of the goods before the attachment became a lien is a question which was, under the facts as shown in the record, conclusively settled in favor of appellee by the finding of the trial court. Judgment will be affirmed.

Judgment affirmed.

J. OBERMANN BREWING COMPANY

v.

WILLIAM D. ADAMS ET AL.

Practice—Bill of Exceptions—Absence of—Original Bill.

1. This court declines to consider the case presented, in the absence from the record of a bill of exceptions.
2. The original bill may be incorporated in the transcript of the record by agreement of the parties, but not otherwise.

[Opinion filed December 24, 1889.]

APPEAL from the Superior Court of Cook County; the
HON. ELLIOTT ANTHONY, Judge, presiding.

MESSRS. SIDNEY C. EASTMAN and BOWEN W. SCHUMACHER,
for appellant.

MR. G. W. PLUMMER, for appellees.

GARNETT, J. The errors assigned on this appeal are all based upon the supposition that a bill of exceptions has been brought to this court. We find, however, that there is no bill of exceptions. There is none in the transcript, which only includes a copy of the praecepe, summons, pleadings, appearance and withdrawal of appearance, verdict, orders of court and appeal bond.

A separate paper entitled, "Adams v. The J. Obermann Brewing Company," was left with the clerk of, but was never filed in this court, and we presume the paper was intended to be the original bill of exceptions in the Superior Court, but are not warranted in treating it as a part of this record. There is nothing to connect it with this record, nor do we find any stipulation that the original bill of exceptions may be so used. The original bill may be incorporated in the transcript of the record by agreement of the parties (Sess. Laws, 1887, 147), but otherwise this court has no authority to examine it. The judgment is affirmed.

Judgment affirmed.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

v.

DAVID ROBERTS, ADMINISTRATOR.

Railroads—Negligence—Personal Injuries—Damages—Services of Deceased—Value of.

1. A witness should not be so examined that his answers will relieve the jury from considering the matters of fact submitted to them.

2. A husband should not be allowed to state, upon trial of a suit brought by him to recover for the death of his wife, alleged to have been occasioned through another's negligence, the value per annum of her services to himself and their children.

[Opinion filed December 24, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. W. H. LYFORD, for appellant.

Messrs. NELSON MONROE and C. T. STRATTON, for appellee.

GARNETT, J. The action is in case, to recover damages for negligence of appellant in causing the death of appellee's wife. The verdict was for \$4,500 and judgment was rendered thereon. On the trial the plaintiff was asked this question:

"What were the services of this lady worth to you and the children per year?" Appellant objected to the question, the objection was overruled and appellant excepted. The witness answered "\$400 at least." By the ruling, the court permitted the witness to decide for the jury one of the material questions in the case. Aside from the failure of the question to confine the inquiry to the fair and reasonable pecuniary value, it is not a fit subject for expert evidence. A witness can not be examined in such a manner that his

answers will relieve the jury from considering and determining the matters of fact submitted to them. *Hoener v. Koch*, 84 Ill. 408; *City of Chicago v. McGiven*, 78 Ill. 347; *Linn v. Sigsbee*, 67 Ill. 75; *C. & A. R. R. Co. v. S. & N. W. R. R. Co.*, 67 Ill. 142; *L., N. A. & C. R. R. Co. v. Cox* (opinion filed in this court April 3, 1889).

The effect of the ruling was not removed by any other evidence in the case nor by the instruction to the jury, and as the objectionable evidence can not be said to have been without influence in the assessment of the damages, we feel constrained to reverse the judgment.

Reversed and remanded.

NICHOLAS DYK
v.
JITCHE DE YOUNG.

*Criminal Law—Assault and Battery—Personal Injuries—Damages—
Newly Discovered Evidence—Diligence—Instructions.*

1. The mere snatching of a paper from another amounts to a technical assault, and, though no injury follows, will justify the recovery of damages.

2. A person entitled to an article withheld by another, should request its return before attempting to take it by force.

3. In an action brought by a married woman for the recovery of damages for injuries occasioned by an assault, this court declines, in view of the evidence, to interfere with the verdict in her behalf.

[Opinion filed December 24, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

MESSRS. VAN BUREN & MOAK, for appellant.

MR. J. C. TRAINOR, for appellee.

GARY, P. J. The appellee is a married woman and was far advanced in pregnancy at the time she alleges the appellant committed upon her an assault and battery. She further alleges a permanent breaking down of her health as a consequence.

The husband of the appellee was to pay to the appellant \$5. The appellant wrote a receipt which (whether against the will of the appellant or not was disputed) the husband took into his hands. The husband gave it to the appellee and she said something about it (but what, is also disputed) and the appellant then attempted to take it from her by pulling it out of her grasp. In this attempt the receipt was torn, but no injury came to the appellee from the force thus used. She alleges, however, that in the same instant he struck her on the abdomen, and that her injuries are the result of that blow.

Whether he did strike her or not, was the subject of conflicting testimony, with some circumstances about which there is no dispute, which may be regarded as corroborating her version.

The extent of her injuries, and even whether she was injured at all or not, are also the subjects of conflicting testimony. For all such controversies the law provides a trial by a jury and makes their verdict, under ordinary circumstances, final.

There is no such absence of evidence supporting the verdict, and no such weight of the evidence against it, as would justify this court setting it aside. The record falls very far short of presenting such a case for the interference of the court, as was held insufficient in *Miller v. Balthasser*, 78 Ill. 302. The court instructed the jury for the appellant, that unless the appellee had "proven the allegations of her declaration by a clear preponderance of the evidence" they would find him not guilty. This was more than he was entitled to. *Bitter v. Saathoff*, 98 Ill. 266, and cases there cited.

The so-called newly discovered testimony relates only to the condition of her health, and the manner in which she lived in squalor, before the alleged assault. As the parties were neighbors, and the appellant was in the house of the

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appellee when he wrote, and attempted to take from her, the receipt, and as her declaration in this suit gave notice of her claim of ruined health, there could be in the discovery of testimony upon those matters, no compliance with the rule of law as to diligence. The rule laid down in *Crozier v. Cooper*, 14 Ill. 139, as to granting new trials for newly discovered evidence has been adhered to in numerous subsequent cases, easily found in the Illinois Reports.

The appellant complains of the refusal of this instruction: "The jury are further instructed, that if they believe from the evidence that the plaintiff, with force, and without the consent of the defendant, obtained the possession of the receipt in question, with the intention of keeping the same without paying the money described in the receipt for the purpose of fraudulently using the same at some future time, then the defendant had a right to obtain the same, using no more violence or force than was necessary to obtain the same."

There was no evidence that she by force obtained the possession of the receipt. If he was entitled to it, and she withheld it, a request must, in such a case, precede the exercise of force. *Tullay v. Reed*, 1 C. & P. 6, and cases cited in 2 Ch. Pl. 698 *et seq.*, 16 Am. from 7th Lond. Ed.

The mere snatching of the paper, or a part of it, from her, was a technical assault, 1 Seln. N. P. 27; 1 Dallas R. 114; 1 Hill, S. C. R. 46, and though no injury followed, would entitle the appellee to some damages. There is no error and the judgment must be affirmed.

Judgment affirmed.

JANE H. HORR

v.

FRANK SLAVIK

Mechanic's Liens—Building Contract—Rescission—Waiver—Evidence.

1. A mechanic's lien can not be enforced upon premises where a given contract was to have been performed where no part of the labor has been

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Horr v. Slavik.

done and no part of the materials used, when the same is rescinded by the owner.

2. Work done and materials furnished without such owner's consent after notice of rescission do not affect the general rule.

3. In such case the contractor's remedy is confined to an action for damages for breach of the contract.

[Opinion filed December 24, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding.

Messrs. C. E. CRUIKSHANK and FRANK H. ATWOOD, for appellant.

Messrs. A. B. BALDWIN and FRANK L. SALISBURY, for appellee.

GARNETT, J. Assuming that a contract was made in December, 1886, between Slavik and Horr, by the terms of which the former agreed to perform certain work, and furnish materials, in the erection of buildings of the latter then in process of construction, still we think Slavik's petition for mechanic's lien can not be maintained, but that he is confined to an action for damages for breach of the contract. There is no denial of the fact that before any work was done on the building by Slavik, and before any of the materials which he claims to have agreed to furnish were delivered at the premises, he was notified by Mrs. Horr's agent that he must not go any further in the matter, as the contract had been let to other contractors.

Without deciding whether this action of appellant was right or wrong, there is nothing in the facts of this case to distinguish it from that class of authorities which hold that when one party to an executory contract gives the other notice of rescission, the latter can not persist in executing his part of the contract and charge the former with consequences that would follow complete execution before notice of rescission. "A party has a right to break his contract, on the terms of being liable for the damages which will accrue for the same

at the time he elects to exercise that right. And it is the duty of the other party, when notified thereof, to exert himself to make the damages as light as possible." 1 Sutherland on Damages, 177; Dillon v. Anderson, 43 N. Y. 231; Hosmer v. Wilson, 7 Mich. 304; Collins v. Delaporte, 115 Mass. 159.

The case is not within Sec. 11, Chap. 82, Rev. Stat. No provision is made in that section for a lien in any case when no part of the labor has been done on, nor any part of the materials attached to, the premises. Here a small fraction of the materials alleged to be embraced in Slavik's contract were connected by him with the building soon after notice of the rescission. But that does not help this case. When no part of the labor had been done and no part of the materials used on the premises where the contractor was to perform his contract, there can be no lien. Hunter v. Blanchard, 18 Ill. 318.

He can be in no better situation when he partially executes his contract, as before stated, after notice of rescission. No waiver of the rescission can be implied against appellant, because she had the materials so attached to the buildings removed therefrom as soon as she was notified thereof. The decree is reversed and remanded.

Reversed and remanded.

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60 428

ROSE KEEGAN AND JOHN KEEGAN, IMPLEADED, ETC.,

V.

KATE ELIZABETH O'CALLAGHAN.

Forcible Detainer—Appeal—Action on Bond—Death of Oblige—Damages.

This court holds that an heir can not maintain an action upon a bond filed on an appeal from a judgment in an action of forcible detainer, to recover the damages accruing after the death of the obligee therein, who was the father of the plaintiff, and before the surrender of possession of the property in question.

Keegan v. O'Callaghan.

[Opinion filed December 24, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Messrs. M. A. RORKE & SON, for appellants.

Messrs. HYNES & DUNNE, for appellee.

GARY, P. J. The appellants were defendants in an action of forcible detainer, wherein the father of the appellee was the plaintiff, and with a surety gave the bond sued upon in this action on an appeal from a judgment against them in that action. He was the obligee in that bond and died pending the appeal.

Their appeal having been unsuccessful, this suit is to recover the damages accruing after his death and before the surrender of possession by the appellants, by reason of their retaining such possession.

The only question is whether she can sue upon the bond.

“In the case of a mere *personal* contract or of a *covenant not running with the land*, if it were made only with *one* person, and he be dead, the action for the breach of it must be brought in the name of his executor or administrator, in whom the legal interest in such contract is vested.” 1 Ch. Pl. 19. What covenant runs with the land, so that one to whom the estate of the covenantee has come may sue upon it, is a subject upon which the books contain as many refined distinctions as upon, probably, any other branch of the law.

The heir can only sue because such estate has come to him. A grantee of the covenantee stands, in the lifetime of the covenantee, in the same position as to suing upon the covenant, that his heir or devisee does after his death. But there is one rule that is of universal application. “It is not sufficient that a covenant is concerning the land, there must be a privity of estate between the covenanting parties.” *Webb v. Russell*, 3 Durn. and E. 393. The surety on this bond had no interest in the land. He is liable only to the personal representative

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of the obligee. If such representative can not recover damages accruing after the death of the covenantee, it only shows that the heir, when substituted in his place on the appeal, under Secs. 10 and 24, Chap. 1, R. S., should have applied for a new bond under Sec. 19, Chap. 57.

It is not a question on this record what damages the personal representative could recover, and probably can never be made a question hereafter, as she has already had her action. The case presents the singular feature of two parties, unconnected in legal interest, each maintaining a separate action as successors of the obligee upon the same bond. The appellants, who were defendants in the action of forcible detainer, are not liable to any action upon this bond to which their surety is also not liable, whatever remedy the appellee may have against them otherwise.

The argument that the appellee is without remedy unless she can sue on this bond, can not change the settled law. *Sanders v. Filley*, 12 Pick. 554. As to what covenants run with the land, it is enough here to refer to 1 Smith, Leading Cases, 180, 9th Ed., where a great multitude of cases are collected and compared.

The judgment must be reversed, but, as the action can not be maintained, it is useless to remand the case.

Judgment reversed.

35	144
114	*442

THE CHICAGO WAREHOUSE AND MANUFACTURING COMPANY

v.

THE ILLINOIS PNEUMATIC TOOL COMPANY.

*Landlord and Tenant—Lease—Implied Covenant for Peaceful and Quiet
Enjoyment—Excessive Heat—Damages—Evidence.*

1. In the absence of an exception thereto, the admission of improper testimony can not be complained of.
2. In an action brought to recover damages for the alleged breach by a

Chi. Warehouse, etc., Co. v. Ill. Pneumatic Tool Co.

landlord of an implied covenant for peaceable and quiet enjoyment, it being claimed that the heat in the premises in question became so oppressive as to compel removal upon the part of the plaintiff, this court holds that defendant was entitled to operate the premises in the same manner under the lease in force when the plaintiffs moved, as under a former one between the same parties, that no evidence was introduced justifying the damages awarded, and that the verdict for the plaintiff can not stand.

[Opinion filed December 24, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Messrs. PADDOCK & WRIGHT, for appellant.

Messrs. DOW & BURNHAM, for appellee.

MORAN, J. This action was brought to recover damages for the alleged breach of an implied covenant for peaceable and quiet enjoyment. Appellant was the owner of a power and manufacturing building, and appellee was the tenant of a portion of said building, and other tenants occupied other portions of the building, and appellee and such other tenants were furnished steam power to carry on manufacturing, by appellant, the boiler for generating the steam being located under the premises occupied by appellee. Appellee first occupied the premises under a lease from the 1st of February, 1887, till the 1st of May, 1887, and while in possession, under said lease, took the lease on which this suit is brought, running from the 1st of May, 1887, to the 30th of April, 1888. While appellee was occupying under the first lease, the boilers were operated at the same degree of heat as afterward, but in May the heat became so oppressive in appellee's premises that appellee's officers and servants could not endure it, and were, as they contend, obliged to move out, which they did, on the fifteenth day of that month.

Appellee having occupied the premises under the prior lease, knew of the location of the boilers, and of the degree of heat used to generate the power furnished to it, and to other tenants, and was bound to take notice of natural laws and to

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understand that the same degree of heat in the boilers would have a greater effect to raise the temperature of the premises occupied by it, in the spring or summer, than it would in a colder season. Appellee contracted in the new lease for power, and knew that it would take heat to generate it, and knew that it would be applied as it had been during its occupancy under the former lease. Appellant was entitled under the new lease to operate the premises in the same manner and under the same conditions as it had done under the former one, and such, in effect, must be taken to have been the understanding of the parties. *Thomas v. Wiggers*, 41 Ill. 470.

Evidence was introduced of a promise by the agent of appellant, made at the time the first lease was executed, that the boilers should be removed to some other location, but for any breach of such a promise appellee could not recover under the declaration in this case, if such breach would furnish the basis of a cause of action at all.

There was no exception taken to the admission of said evidence, and error can not therefore be assigned for such admission.

The judgment must be reversed, however, as we can see no basis on which the damages which were awarded could be assigned.

The first lease terminated on the 1st of May, and appellee would have been obliged to move out then if it had not executed the new lease. It did move out on May 15th. A witness testified the expense in fitting up and moving out amounted to \$523, and the jury rendered a verdict for \$300. It was not shown that any fitting up was done after the making of the new lease, or in what way moving out on the 15th of May created expenses that moving on the 1st, when the old lease terminated, would not have made necessary.

The nature of the damage is nowhere stated, and no facts or circumstances were furnished the jury from which they might see that there was damage and intelligently estimate the amount thereof.

The judgment must be reversed and the case remanded for a new trial.

Reversed and remanded.

JOHN C. W. RHODE
v.
J. S. OSCAR MATTHAI.

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54	305
54	535
35	147
58	76
35	147
156	33

Attachment—Stock and Fixtures—Fraudulent Conveyance—Mortgage.

1. Mortgages upon stock and fixtures are invalid, so far as the stock is concerned, as against creditors of the mortgagor, when sales therefrom are made by consent of the mortgagees.

2. Upon attachment proceedings based upon the charge that the defendant had fraudulently conveyed his property, this court declines, in the absence of evidence of fraud in fact, to interfere with the judgment in his behalf.

[Opinion filed December 24, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Messrs. MATZ & FISHER, for appellant.

Chattel mortgages permitting a sale of mortgaged stock, or where there is a knowledge by the mortgagee of the sale of mortgaged stock and an appropriation of the proceeds to the use of the mortgagor, are fraudulent as against attaching creditors.

While our Supreme Court seems never to have passed upon the questions, we respectfully contend that a mortgage with an express or implied arrangement or understanding between the mortgagor and mortgagee, or knowledge on the part of the mortgagee, that the mortgagor is disposing of the mortgaged chattels and appropriating the proceeds to his own use, is fraudulent as against attaching creditors, and should be so declared by this court, as it has been by the courts of other States.

In *City Bank v. Westbury*, 16 Hun, 458, an attachment was issued against the defendant, a boot and shoe manufacturer, on the ground that he had made a fraudulent disposition of his property. He had given a chattel mortgage on all

stock manufactured, and to be manufactured, and made an agreement with the mortgagee that he should continue in possession and sell partly for his own use. The court held it fraudulent *per se* and ground for attachment.

In *Place v. Langworthy*, 13 Wis. 629, a mortgage was given on a stock of goods, authorizing the mortgagor to retain possession of the property and dispose of it in regular course of retail trade, paying out of the proceeds all necessary expenses of the business, and of the support of the mortgagor and his family, so long as he should deposit the excess to the credit of the mortgagee. It was held upon its face fraudulent in law and ground for attachment.

In *Orton v. Orton*, 7 Oregon, 478, it was held that where it appears either on the face of a chattel mortgage or by parol evidence, that the mortgagee of personal property had given to the mortgagor unlimited power to dispose of the property mortgaged for the use of the mortgagor, the mortgage is fraudulent as to attaching creditors.

In *Putnam v. Osgood*, 52 N. H. 148, it was held that an agreement or understanding between a mortgagor and mortgagee of chattels, though made after the execution of the mortgage, that the mortgagor may sell the mortgaged property or a part thereof on his own account, renders the mortgage void as to attaching creditors, and such agreement or understanding will be proved by evidence that the mortgagor did so with the knowledge of the mortgagee and without objection on his part.

In *Steinart v. Denster*, 23 Wis. 136, it was held that where there was an oral agreement between mortgagor and mortgagee of chattels that the former should retain possession of the goods and sell them in the regular course of business and apply the proceeds to his own use in the support of his family and otherwise, the mortgage was fraudulent to attaching creditors.

Messrs. RUBENS & MOTT, for appellee.

Only two cases are cited by appellant which sustain his position; these are *City Bank v. Westbury*, 16 Hun, 458, and *Anderson v. Patterson*, 64 Wis. 557.

Both of these cases hold that such a mortgage is a fraudulent conveyance within the meaning of the attachment acts of those States respectively.

The contrary has been decided in Kentucky and Missouri. *Ross v. Wilson*, 7 Bush. 29; *Spencer v. Deagle*, 34 Mo. 455.

The Missouri attachment act is the same as our own, and in *Spencer v. Deagle*, *supra*, where the question was as to whether a chattel mortgage, covering a stock of liquors and cigars, and from which it appeared that the mortgagor was to make sales, would authorize an attachment, the court says: "The defendant asked the following instruction, which was refused: 'This jury are instructed that to render the deed of trust in question fraudulent as to Deagle's creditors, it must appear from the evidence, and you must be satisfied that the deed was executed for that purpose. It is not enough that the effect of the deed is such as to delay creditors of defendant, he must have executed it with that purpose and intent.' This instruction should have been given. The deed itself appeared to be fair, and made in good faith, and the intent to delay creditors was necessary to constitute it a fraud upon him."

This case has been cited with approval and the same doctrine declared in this State.

GARY, P. J. This case is nearly the converse of *Spear v. Joyce*, 27 Ill. App. 456. It is an attachment based upon the charge that the appellee had within two years fraudulently conveyed, etc.

He kept a saloon and the stock and fixtures were covered by chattel mortgages. He made sales from the stock in the ordinary course of business, necessarily with the knowledge, and implied, if not express, consent of the mortgagees. As to the stock, therefore, the mortgages were invalid as against creditors. *Davis v. Ransom*, 18 Ill. 398. But not as to the fixtures. *Barnet v. Fergus*, 51 Ill. 352.

The same consequence might follow as to a sale without a sufficient delivery. *Schwabacker v. Rush*, 81 Ill. 310. Constructive fraud, however, if there is in the mortgagor or

vendor no fraudulent intent, in fact, is no ground for an attachment against him. Last case, and *Shove v. Farwell*, 9 Ill. App. 256.

The Superior Court was of this opinion, and there being no evidence of fraud in fact, instructed the jury to find for the appellee on the attachment issue. The judgment affirmed.

Judgment affirmed.

AARON W. BURNSIDE

V.

P. L. O'HARA ET AL.

Mechanic's Liens—Sec. 35, Chap. 82, R. S.—Sess. Laws, 1887, 109—Amendment.

1. A contractor who hires out his license to another who has none, in order that the latter may purchase material and carry out a contract he has entered into, is not entitled to a lien upon the premises in question, in case of non-payment of the price agreed upon for the use of said license.

2. A waiver by an owner of that which the statute expressly makes a condition precedent to the attaching of a lien, can not be relied upon as a substitute for the performance of the condition in question.

[Opinion filed December 24, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Mr. G. W. PLUMMER, for appellant.

Mr. G. W. HALL, for appellees.

GARNETT, J. This appeal calls in question a decree for a mechanic's lien for \$215.88, rendered on a cross-petition filed by O'Hara against Burnside.

The labor and material for which the lien is asserted, were included in the contract for plumbing, gas fitting and sewer

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43	514
35	150
46	576

35	150
76	375

building in appellant's house. One Cook was the original contractor for the plumbing, etc., and as he was not a licensed plumber, he made an agreement with O'Hara to use the license of the latter in purchasing the plumber's materials. The object was to enable Cook to make the purchase, which it seems he could not have done without the use of the license.

In consideration of the use of the license, Cook agreed to pay to O'Hara, ten per cent on the cost of the materials. The cross-petition sets up a claim of \$40 under that contract. The statute makes no provision for such a case. Only those who furnish labor and materials, or services as an architect or superintendent, are entitled to liens. Appellee did neither, but simply hired out the use of his license, and for a recovery he can have a remedy against none but Cook.

After partial performance of his contract, Cook either abandoned the job, or was discharged, and a new contract is said to have been made by O'Hara with Burnside to complete the plumbing, etc. O'Hara says he finished the work under that contract, and the court below by its decree awarded him \$175.88 therefor.

Sec. 35, Chap. 82, R. S., as amended (Sess. Laws 1887, 169), requires the original contractor, whenever any payment of money shall become due from the owner, to make out and give to the owner a statement under oath, of the number, name of every sub-contractor, mechanic or workman in his employ, or persons furnishing materials, giving their names and the rate of wages or the terms of contract, and how much, if anything, is due or to become due to them or any of them, for work done or materials furnished, and the section further enacts that until the statement thus provided for is made, the contractor shall have no right of action or lien against the owner on account of such contract.

There is no pretense of compliance with this section, either in the petition or in the evidence. The delivery of the statement is made a condition precedent to the attaching of a lien. It can not attach by waiver of the condition, as counsel for appellee insists. In this proceeding the rights of the contractor are purely statutory. The lien "is exclusively the creature

of statute, deriving its existence only from positive enactment. There can be no lien independent of statute. It does not arise out of, nor is it the essence of, the contract for labor, nor dependent on the motives which suggest its being enforced. It is a mere incidental accompaniment as a means of enforcing payment; a remedy given by law, which secures the preference provided for, but does not exist, however equitable the claim may be, unless the party brings himself within the provisions of the statute, and shows a substantial compliance with all its essential requirements." Phillips on Mechanics' Liens, Sec. 9.

And as the right to a lien does not arise out of a contract, but wholly from the statute, we think a waiver by the owner of that which the statute expressly makes a condition precedent to the attaching of a lien, can not be relied upon as a substitute for performance of the condition. In this respect the case differs from Downey v. O'Donnell, 92 Ill. 559.

What is here said must not be understood as deciding that an action at law can not be maintained without delivery of the statement described in Sec. 35, where a waiver thereof is proved.

This opinion concerns statutory rights only.

If, as suggested by appellee, the statement was delivered to Burnside, he can amend the cross-petition on the redocketing of the case in the Superior Court, and on the next hearing, make proof thereof.

The decree is reversed and the cause remanded.

Reversed and remanded.

J. W. BUTLER PAPER COMPANY

V.

J. L. REGAN PRINTING COMPANY.

*Attachment—Debt not Due—Default—Motion to Set Aside—Fraud—
Amendment—Attorneys—Employment of by Receiver—Costs.*

Butler Paper Co. v. Regan Printing Co.

1. A harmless error is no cause for reversal.
2. Upon attachment proceedings based upon a debt not due when the suit was commenced, this court, in view of the evidence, declines to interfere with the judgment for the defendant.
3. This court holds as proper, the employment of certain solicitors in chancery proceedings involving the parties to the case presented.

[Opinion filed December 24, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

MESSRS. McCLELLAN, CUMMINS & MOULTON and ROBERT MATHER, for appellant.

MESSRS. CRATTY BROS. & ASHCRAFT, for appellee.

The setting aside of defaults is a matter of discretion, and the action of the court will not be reversed except where the discretion has been grossly abused. *Peoria & B. T. Ry. Co. v. Mitchell*, 74 Ill. 394; *Schroer v. Wessell*, 89 Ill. 113; *Andrews v. Campbell*, 94 Ill. 577; *Mason v. McNamara*, 57 Ill. 274.

On a motion to set aside a default, counter-affidavits should not be read or considered. *Thelin v. Thelin*, 8 Ill. App. 421; *Mendell v. Kimball*, 85 Ill. 582.

The court may properly open a judgment and let a defendant in to plead, imposing such terms as may be deemed reasonable, as that he plead instanter, pay costs, or that the judgment stand as security until the trial. *Mason v. McNamara*, 57 Ill. 274; *Page v. Wallace*, 87 Ill. 84.

GARNETT, J. The attachment suit brought in the Superior Court by appellant against appellee, was based on a debt not due when the suit was commenced. A plea of the general issue, with affidavit of merits and a plea in abatement of the attachment were duly filed for the defendant, by attorneys who afterward withdrew from the case, one of the plaintiff's attorneys being notified of such withdrawal. Afterward notice was given by plaintiff's attorneys to the same attorneys

who had thus discharged themselves from further connection with the litigation, of a motion to strike the pleas from the files. The notice was not accepted by the attorney to whom it was delivered, but proof of service thereof was made by affidavit, and on the hearing of the motion the court entered an order striking the pleas from the files. Thereupon judgment by default was entered for the amount claimed, with an award of general and special execution.

At the same term, the defendant, by other attorneys, moved the court to set aside the default, and give leave to plead. The motion, supported by affidavits showing the debt was not due when suit was commenced, was sustained, and it was ordered that the judgment be opened, that defendant be let in to defend the action upon its merits, and that the judgment stand as security until the cause was tried and determined. The defendant then filed another plea of the general issue with affidavit of merits and a verified plea in abatement of the attachment. The cause was reached for trial March 18, 1889, when the plaintiff moved to strike the pleas from the files. The motion was overruled, and plaintiff failing to prosecute its suit, it was then ordered by the court on defendant's motion, that the suit be dismissed, and judgment for costs was entered against the plaintiff. In this action of the court no abuse of discretion is perceived. The opposite course would have been better adapted to provoke censure. That the suit was without foundation, was tacitly confessed by plaintiff's failure to make any attempt to sustain either its demand for a matured debt, or the allegation of fraud upon which the attachment was based.

If the new plea in abatement can be considered as an amended plea, its allowance was authorized by Sec. 23, Chap 110, R. S., which provides in the most liberal terms for amendment of pleadings. Before the motion was made to set aside the judgment, a receiver for appellee had been appointed by the Circuit Court of Cook County, in a proceeding in chancery against appellee, there pending. The solicitors appearing for the complainant in that proceeding were the same

Henderson & Co. v. Schaas.

who appeared for appellee on the motion to set aside the judgment in this case, and appellant says it was fatal error for the court to allow them to defend the suit, as the interests of their client in the chancery suit were hostile to appellee. Whatever may be said as to the propriety of a receiver employing, to represent the estate, the same counsel who appeared for the complainant in the suit in which the receiver was appointed (and the views of this court on this point are expressed in *Heffron v. Flower*, 35 Ill. App. 200), it was not an error of which appellant may complain. It appears that the chancellor approved the employment of these gentlemen by the receiver, and as they have performed with fidelity the service for which they were engaged, the court is not disposed to require appellee to release the advantage upon the prayer of another, whose interests are more hostile than complainant's in the chancery suit.

The practice adopted by the court in disposing of the case may not be the best, but appellant was not injured thereby. Having ordered the judgment to stand as security for the result of a trial of the issues, the court thereby retained control of the judgment the same as it would in case of an interlocutory order. The issues having been determined against plaintiff, the better course, no doubt, would have been to set aside the default and judgment and then order the suit dismissed. But an error that is harmless is no cause of reversal. The judgment is affirmed.

Judgment affirmed.

C. M. HENDERSON & Co.

v.

D. SCHAAS ET AL.

Attachment — Garnishment — Insurance Companies — Assignment by Debtor—Dividend—Payment to Attaching Creditor.

1. A voluntary assignment with preferences, made in another State by a resident thereof, is not operative to convey the title to property in Illinois.

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35	155
62	247

as against creditors of the assignor residing in this State, who are seeking by attachment in the courts here to subject such property to payment of their debts.

2. Insurance companies having agencies in this State are liable as garnishees of non-resident creditors under policies upon which payments are due through the occurrence of fires, although by the terms thereof they are payable in another State.

3. In the case presented, this court holds that the presentation of plaintiffs' claim to defendant's assignee in Montana and the receipt of a dividend thereon, did not estop them from prosecuting an attachment suit instituted in this State and that the judgment against them can not stand.

[Opinion filed December 24, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Mr. JAMES A. FULLENWIDER, for appellants.

Mr. THOMAS BATES, for appellees.

MORAN, J. The appellee, D. Schaas, was a retail merchant at Helena, Montana, and was indebted to the firm of C. M. Henderson & Co., of Chicago, appellants, in the sum of \$541 which debt was due about June 1, 1888, and was at that date sent by appellants to a firm of attorneys at Helena for collection. On June 6, 1888, the stock of Schaas was destroyed by fire, and afterward, on the same day, he made an assignment to one Kleinschmidt, at Helena, for the benefit of creditors, which assignment contained certain preferences. On July 17, 1888, appellants commenced this suit, by attachment, against Schaas, and the appellee insurance companies were served as garnishees, and such proceedings were had that on October 8, 1888, appellants took judgment against Schaas, and that November 19, 1888, the Commercial Union Assurance Company filed its answer as garnishee, admitting an indebtedness due to Schaas or his assignee of \$483.33, and the Imperial Fire Insurance Company answered, admitting \$161.11 due; and each of said companies set up the voluntary assignment of Schaas as a reason why they should not be compelled to

pay the money to appellants. On April 12, 1889, Kleinschmidt was permitted to file an intervening petition, in which he set up the assignment to him by Schaas, dated June 6, 1888, and that on September 13, 1888, the attorney to whom appellants had sent their claim against Schaas presented the same to said assignee, at Helena, and he afterward paid to said attorneys for appellants a dividend of fifteen per cent, amounting to \$80.93. There was a demurrer to the intervening petition by appellants, which was overruled, and motions for judgment against the garnishees on the answers, but such motions were denied by the court, and the matter was tried by the court without a jury, and a finding in favor of the assignee, and judgment that the garnishees pay over the money due on the policies to him. Appellants on the trial denied that their attorneys at Helena were authorized or directed to present their claim against Schaas to the assignee, but they admitted the receipt of \$80.93 from said attorneys to apply on said claim, and they tendered said amount in currency to the assignee in open court, but he would not receive it, and they offered to credit that amount on the judgment against Schaas.

It is well settled that a voluntary assignment, with preferences, made in another State by a resident thereof, is not operative to convey the title to property in Illinois as against creditors of the assignor residing in this State, who are seeking by attachment in the courts here to subject such property to payment of their debts. *Heyer v. Alexander*, 108 Ill. 335; *May, assignee, v. First National Bank of Attleboro*, 122 Ill. 551.

The garnishee insurance companies had agencies and were doing business in this State, and were therefore, as corporations, resident here, and liable here as garnishees of their non-resident creditor; and though by the terms of their respective contracts the payment of their said creditor was to be made in Montana, yet in contemplation of law the debt was due here. *Roche et al. v. Rhode Island Insurance Association*, 2 Ill. App. 360, and cases there cited.

The foregoing propositions are not seriously controverted

by appellee's counsel, but he insists that appellants' attorneys having presented their claim to the assignee, Kleinschmidt, in Montana, and having received a dividend from him upon it, which dividend appellants retained until the trial, they have assented to and confirmed said assignment, and are, therefore, estopped from denying its validity, and are bound by it.

We think this contention of appellee is answered adversely to him in the case of *Yates v. Dodge*, 123 Ill. 50, where it is held that the fact that an attaching creditor filed his claim with the assignee of the debtor and received a dividend upon it from the general assets of the estate in the hands of the assignee, made no difference as to his right to proceed in the attachment suit, and subject the attached property to the payment of his debt. The dividend would be applied in reduction of his claim, and the surplus of the proceeds of the sale of the attached property, after paying the claim thus reduced, would belong to the assignee for the purposes of the assignment. There are no facts in this case which distinguish it so far as regards the application of the same principle, from *Yates v. Dodge*.

The receipt of the dividend in Montana, constituted no estoppel against appellants. Their action in doing so induced no party to this litigation to change his position or condition, or to forego the enforcement of any right. *Moore v. Church*, 70 Ia. 208, and *Francis v. Evans*, 69 Wis. 115, are in harmony with *Yates v. Dodge*.

The Circuit Court erred in rendering judgment in favor of the assignee on the interpleader, and the judgment will be reversed and the cause remanded with directions to credit the dividend received by appellants upon their judgment against Schaas, and to render judgment in favor of appellant, and against the garnishees on their answers, and if there shall remain a surplus after the payment of costs and the satisfaction of appellants' claim, the same will be paid over to the assignee.

Reversed and remanded with directions.

Stricker v. Kubusky.

IGNATZ STRICKER

v.

FRANK KUBUSKY.

35	159
68	485

Exemptions—Custody—Petition for Release from—County Judges—Interchange of—Judicial Notice—Failure to Schedule—Practice.

1. Upon the petition of a debtor in custody to be released, the same setting forth an offer to deliver up his property, it is necessary for him to make a schedule thereof even if it be exempt from execution.

2. Where a county court within a district over which an appellate court has jurisdiction, is presided over by one who is not the judge of that county court, and there is nothing in the record to show why he does so preside, the appellate court, if the proceedings come before it for review, must take notice of the fact, if fact it be, that the person so presiding is judge of another county court of this State, whether in the same district or another, and presume the existence of circumstances justifying him in so presiding.

[Opinion filed December 24, 1889.]

APPEAL from the County Court of Cook County; the Hon. E. H. GARY, Judge, presiding.

Mr. CHARLES A. FANNING, for appellant.

Mr. JAMES MILLS, for appellee.

GARY, P. J. The appellant presented to the County Court a petition alleging that he was in custody under a *ca. sa.* and desired to be released by delivering up his property. The case was postponed a week and then came on to be heard before Judge E. H. Gary, presiding. As the record does not show why he presided, and as this court must take notice that the name of the county judge of this county is Richard Prendergast, the appellant alleges the proceedings are invalid.

"An act to authorize county judges to interchange, hold court for each other, and perform each other's duties," approved May 31, 1879, does authorize what the title indicates. 1 Starr & Curtis' Ill. Stats., 731.

In *Propst v. Meadows*, 13 Ill. 157, the rule is laid down, and in many subsequent cases has been applied under a great variety of circumstances, that "when the County Court is acting upon the classes of subjects within its jurisdiction, as liberal intendments will be granted in its favor as would be extended to the proceedings of the Circuit Court; and it is not necessary that all the facts and circumstances which justify its action, should affirmatively appear upon the face of its proceedings." Again: "A court is presumed to know its own officers, and all public officers in civil affairs, within its jurisdiction." *Thompson v. Haskell*, 21 Ill. 215.

Where a circuit judge is holding court in another circuit than his own, though the record does not show why, it will be presumed he is doing so rightfully. *Scott v. White*, 71 Ill. 287; *Reitz v. People*, 77 Ill. 518; *Morgan v. Corlies*, 81 Ill. 72. From these propositions it follows that where a county court, within a district over which an appellate court has jurisdiction, is presided over by one who is not the judge of that county court, and there is nothing in the record to show why he does so, the appellate court, if the proceedings come before it for review, must take notice of the fact, if fact it be, that the gentleman so presiding is judge of another county court of this State, whether in the same district or another, and presume the existence of circumstances justifying him in so presiding. And the result would be the same if the only authority for one county judge to perform the duties of another was derived from the act of April 10, 1885, 3 Starr & C. Ill. Stats., 152.

This court must, therefore, take notice that Judge E. H. Gary is judge of the County Court of Du Page County, and presume the existence of circumstances calling him to preside in Cook County.

When the appellant got before the County Court he made no offer to surrender his property, and made no schedule of property he confessed he had, which was necessary, even if it was all exempt from execution. Secs. 8 and 9 of the act concerning insolvent debtors, of April 10, 1872.

What was the nature of the case, whether in an action of

Lehman & Sons Co. v. Siggeman.

tort or issued upon a refusal to surrender property to satisfy a *fi. fa.*, the record does not show. Testimony was put in as to the manner in which Stricker became indebted, and as to his pecuniary condition, but for what purpose, or relating to what issue, is left wholly to conjecture.

There is no error, and the order remanding the appellant to the custody of the sheriff is affirmed.

Order affirmed.

GEORGE LEHMAN & SONS COMPANY

V.

CONRAD SIGGEMAN.

Master and Servant—Superior Servant—Negligence of—Personal Injuries—Scope of Employment—Evidence—Instruction.

1. In an action brought to recover from an employer for injuries suffered by a servant through undertaking a work outside the scope of his employment, by the order of a superior servant, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff.

2. An instruction assuming a state of facts contrary to those shown by the evidence in the case, should not be given.

[Opinion filed December 24, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

Mr. GEORGE W. PLUMMER, for appellant.

Mr. M. SALOMON, for appellee.

Per Curiam. Judgment was rendered in the court below in favor of appellee, and against appellant, for damages alleged to have been received while cleaning a certain brick machine while the same was in operation.

The evidence tended to show that the appellee was directed by the foreman of appellant to clean the machine, that he attempted to do so, and had his hand caught in the machine, and severely injured. It is substantially agreed by appellants, that cleaning the machine was not incident to the work which appellee was employed to perform, and it is shown by the evidence that he had no experience whatever in the matter of cleaning, and had never been instructed in reference thereto or directed to attempt said work before the day when the accident occurred. He was thus injured while engaged in performing, under command of his superior, an act out of the sphere of the employment in which he had been engaged to serve, and subjected to a peril which he did not understand, and which, by his engagement, he did not assume. The case was fairly submitted to the jury on questions as to the due care of appellee, and as to the negligence of appellants, and while it is contended by counsel that the conclusion of the jury on these issues is not sustained by the evidence, an examination of the record satisfies us that the verdict is warranted.

The only error of law claimed to have been committed by the trial court is the refusal to give to the jury appellants' instruction numbered six. Said instruction was intended to relate to certain evidence which tended to show that the brick machine by which appellee was injured, was out of repair. but while it sought to impose on appellee the consequence of continuing to work at the machine so out of repair without reporting its defective condition to appellants, it excludes the hypothesis that cleaning the machine was any part of the work for which he was employed, and rather assumes, against the concurring testimony of all parties to the action, that he was employed to do said work. In this, the instruction was erroneous, and was properly refused.

There is no error in the judgment appealed from, and it will therefore be affirmed.

Judgment affirmed.

Trott v. Wolfe.

DAVID J. TROTT, BY HIS NEXT FRIEND,

V.

JACOB WOLFE.

35	163
41	348
36	163
44	344

Master and Servant—Negligence of Servant—Injury to Third Person—Damages—Evidence—Instructions.

1. Negligence is a question of fact for the jury.
2. An instruction setting forth that a preponderance of the evidence does not necessarily mean a majority of witnesses, and that the evidence of one creditable witness may be taken and given credence in preference to the evidence of a number of witnesses believed to be swearing falsely, should not be given, for a jury may not capriciously believe a number of witnesses are swearing to falsehoods.

[Opinion filed December 24, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. NELSON MONROE and CHARLES T. STRATTAN, for appellant.

Mr. J. C. SCOVEL, for appellee.

GARY, P. J. For error in law, with no intimation as to what the merits are, the judgment in this case must be reversed.

The appellee is an infant suing by his next friend, for injuries sustained by being run over by a beer wagon in an alley.

For the appellee the court instructed the jury:

“The court instructs the jury that the law is that no one is responsible for an injury caused purely by inevitable accident while he is engaged in a lawful business, even though the injury was the direct consequence of his own act and the injured party was at the time lawfully employed and in all respects free from fault, and in this case, if the jury believe from the evidence that defendant’s driver was driving slowly and cautiously through the alley in which the accident occurred, and that his attention was turned in another direction so that he

did not see the child, and that the child ran from the yard into the wagon being driven by defendant's driver, and that said injury was received in this way, then there can be no recovery in this case and your verdict must be for the defendant."

The wagon at the time was being driven by the son of the appellant, aged fifteen, and the man who was the regular driver sat on the right hand, reading. Negligence is a question of fact for the jury, and they are to say whether the attention of the driver being turned in another direction so that he could not see the child, is an excuse or not.

The appellant also complains of the refusal of this instruction:

"The jury are instructed that a preponderance of the evidence does not necessarily mean a majority of witnesses and that the evidence of one creditable witness may be taken and given credence by the jury in preference to the evidence of a number of witnesses that the jury believe are swearing to falsehoods."

It was rightfully refused; creditable as synonymous with credible is obsolete, and a jury may not capriciously believe a number of witnesses are swearing to falsehoods. It may be questionable whether the refusal of any instruction that relates only to the credibility of witnesses is error.

"The credibility of witnesses is for the jury. The court can not instruct who to believe. There is no artificial rule of belief to control the minds of a jury." *Clevenger v. Curry*, 81 Ill. 432.

Reversed and remanded.

JOHN V. FARWELL ET AL.

v.

PEHR W. NILSSON ET AL.

*Creditor's Bill—Insolvency—Preferences—Judgment by Confession—
Fraud—Constructive Assignment—Act of 1887.*

35	164
41	392
35	164
43	502
44	196
35	164
70	325

Farwell v. Nilsson.

1. The act of 1887 only prohibits preferences set forth in deeds of assignment; the form thereof if adequate cuts no figure.

2. Before a court of equity has jurisdiction to prevent frauds upon such act, and to treat transfers as parts of an assignment, there must be the execution of an instrument which creates a trust for the benefit of creditors.

3. A debtor in failing circumstances not seeking the benefit of the assignment law, may prefer creditors by giving to one or more of them, judgment notes, by which they are enabled to satisfy their claims out of the debtor's property by the appropriation of all his assets, although to the exclusion of other creditors.

[Opinion filed December 24, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. LOREN C. COLLINS, Judge, presiding.

Appellant filed a creditor's bill in which, after alleging the recovery of a judgment against said appellee Nilsson, and the return of an execution issued thereon, no part satisfied, it is further alleged, that April 5, 1888, and for some time prior to that date, the defendant Nilsson, was engaged in mercantile business in the city of Chicago, and on that date, and for a long time prior thereto, but for how long complainants are unable to state, said Nilsson was wholly insolvent and unable to pay his debts; that knowing his said insolvent condition and that he could no longer continue in the business, and would shortly be obliged to yield the control and possession of his property to his creditors, he set about arranging his affairs with that end in view. Knowing that if he made a general assignment for the benefit of all his creditors in the usual and regular form, he would not be able legally to incorporate into such assignment, preferences for any of the creditors above the others, and desiring to accomplish substantially the same result, he devised a scheme whereby fraudulently to avoid the effect of the assignment law of this State, and to enable certain of his creditors to secure an unfair and unlawful advantage over the others in the distribution of his property. In pursuance of this scheme said defendant, well knowing that such preferences were sufficient to exhaust the

whole of his assets, and that by such preferences all the other creditors would be deprived of any share in his property, caused judgments to be entered against himself by confession in the Superior Court of Cook County, upon the 5th of April, 1888, in favor of the following named defendants, for the amounts set opposite their respective names, to wit: (setting out the names of the co-defendants and the amount of the judgment of each.) That said defendant Nilsson caused executions to be issued forthwith upon said judgments, and had the same placed in the hands of the sheriff of Cook county to execute; that under said executions on the same date, the sheriff levied upon the stock of goods belonging to said defendant, that being all of the property subject to levy, and sold the same under said executions on the 16th and 17th of April, 1888, realizing therefrom \$6,571.25, which amount was all applied upon said executions, and paid to said execution creditors, respectively, by said sheriff.

That said defendant Nilsson caused said judgments to be entered, and said executions to be issued in pursuance of a plan to turn over and assign all his property to a small number of his creditors, and fraudulently to exclude and deprive his other creditors of any share in his property or of any benefit of said assignment; that said confessions of judgment were in effect but one act, although carried out in a way intended to avoid the outward appearance of a formal and statutory assignment, and that the same constitute a general assignment for the benefit of all creditors within the true meaning and intent of the assignment law of this State; that said preferences in said assignment in favor of said judgment creditors were each of them fraudulent, illegal and void as to your orators, and the other *bona fide* creditors of said Nilsson. That said judgments were so confessed by said Nilsson while he was, and knew himself to be wholly and absolutely insolvent, and about to quit business, and that said judgments were fraudulent, illegal and void as preferences in said assignment, and constituted a fraud upon the rights of said defendant's *bona fide* creditors.

The bill waives answer under oath, and prays that the con-

fessions of judgment and execution levies may be declared to be a part of one transaction and plan, and to constitute both in law and in fact an assignment by said Nilsson for the benefit of all creditors within the true intent and meaning of the laws of this State in that behalf; and that said judgments, executions, and the pretended liens thereof may be vacated and set aside, and the property covered thereby administered by said court for the equal benefit of all the creditors of said Nilsson; that a receiver may be appointed, and that defendant may be required to turn over to such receiver all of his property, and that the judgment creditors, who are made defendants herein, may each be required to account for and pay over to said receiver all moneys realized by them, respectively, from the transaction above set forth, to be distributed among the creditors of said Nilsson, and that complainants may have general relief.

Nilsson demurred to the bill, assigning as a special ground of demurrer that it does not appear from the allegations therein that he ever intended to make a voluntary assignment for the benefit of all his creditors, or that he performed any act at or before the entry of said judgments, which would confer jurisdiction on this or on any other court to declare the judgments fraudulent or void as against complainants. The court sustained the demurrer and dismissed the bill for want of equity, and complainants bring the record to this court by appeal and assign the action of the court in sustaining the demurrer as error.

Messrs. TENNEY, HAWLEY & COFFEEN, for appellants.

Mr. EMERY S. WALKER, for appellees.

The case of *White v. Cotzhausen*, 129 U. S. 329, affords the only foundation for this proceeding. The opinion of Justice Harlan goes much farther than the case of *Preston v. Spaulding*, 120 Ill. 208, which was quoted by him, and referred to by appellants in the case at bar, in support of their bill.

The case of *Schroeder v. Walsh*, 120 Ill. 403 (in view of the fact that the opinion was filed the same day, and written

by the same judge as the opinion in the case of Preston v. Spaulding) affords the best answer to the proposition of appellants, that the Supreme Court of the United States followed the decisions of our Supreme Court.

In the case of Schroeder v. Walsh, it was said by our Supreme Court: * * * "In the absence of any bankrupt law or statute to the contrary, the law is well settled that a debtor in failing circumstances, not seeking the benefit of the general assignment law, may prefer one creditor to another equally meritorious, if done in good faith. * * *

"The statute relating to assignments by debtors for the benefit of their creditors, and prohibiting preferences in such assignments, has no application to cases of this kind. Notwithstanding that statute, the debtor may pay one creditor in full, either in money or by the sale of his property.

"That act applies only to conveyances of property to an assignee or trustee in trust, to convert the same into money for the benefit of the creditors of the assignor, which can now only be made under that law."

Justice Harlan does not refer to this opinion, and it is not likely that his attention was directed to this case. Assuming, as he does, to follow the decisions of our courts, he could not reconcile the opinion in this case with his own.

In the case of White v. Cotzhausen, the lower court set aside certain conveyances and confessions of judgment for the want of *bona fide* consideration. The question of the application of the provisions of the assignment act was raised for the first time, when the case was argued in the United States Supreme Court. There were several instruments executed by which actual transfers of property were made. In this respect the case differs from the one presented by the allegations in the bill filed in the case at bar.

MORAN, J. The question presented by this case and argued by counsel is, whether a debtor who is in failing circumstances may prefer creditors by giving to one or more of them judgment notes, by which such creditors are enabled to satisfy their claims out of the debtor's property to the exclusion of other creditors, and by the appropriation of all the debtor's assets.

Appellant's contention is based upon what is claimed to be the proper construction of the voluntary assignment law of this State, known as act of 1887, and the argument is that as that act declares that every provision in any assignment providing for the payment of one debt or liability in preference to another, shall be void, it effectually inhibits the debtor who is insolvent, from paying any creditor what he owes him by turning out or transferring property to him, or by giving him a judgment note, which will enable him to subject all the debtor's property to the payment of his debt, to the exclusion of other creditors of such insolvent.

The right of a debtor to pay one creditor in preference to another, or to turn out property in satisfaction of, or to create a lien upon it, for the security of a particular debt, in preference to, and to the exclusion of, other liabilities, always existed at common law. And this right of preference might be exercised by the debtor when making a general assignment, in this State, prior to the passage of the act of 1887, as has been repeatedly decided by the Supreme Court. That act does not purport, by its terms, to regulate or prohibit preferences generally, but only preferences in an assignment; that is, preferences written in an assignment, or created by such instrument or device, and under such circumstances, as authorize them to be read into the assignment and treated as void, as being part thereof. The word assignment, had at the time this statute was adopted a well defined meaning understood by all the people, and it has no different meaning in said act. To quote from the opinion of Mr. Justice Magruder, in the case of *Farwell v. Cohon*, recently decided (21 Legal News, 359): "According to the common acceptation of the term it is a transfer without compulsion of law by a debtor of his property to an assignee in trust to apply the same, or the proceeds thereof, to the payment of his debts and to return the surplus, if any, to the debtor. As to the form and contents of it, it has always been understood in this State to be a written deed of conveyance, executed by the assignor as party of the first part to the assignee as party of the second part, reciting the grantor's indebtedness and inability to pay, and conveying

his property, real and personal, by apt words of sale and transfer, to the assignee in trust, to take possession of and sell the same, and to collect the outstanding debts, and out of the proceeds to pay the creditors."

It was preferences in instruments, such as above described, that the Legislature intended to prohibit. The mere form of the instrument is, no doubt, immaterial, provided the operation of it is to create a trust in the property conveyed for the benefit of creditors, and if such is the purpose and design of the instrument, then any preference in it, or which by construction of the law, forms a part of it, is in fraud of the statute and void. The object of the law was to prohibit discrimination by a debtor making a voluntary assignment, in favor of particular creditors, and it is not preference of a creditor itself that is condemned but a preference as a feature of such assignment.

Certain language in the opinion of the court in *Preston v. Spaulding*, 120 Ill. 208, is relied on to support the contention of appellant that the assignment in which preferences are forbidden is such transfer, taken as a whole, whether made up of one or many acts, by which an insolvent debtor divests himself of substantially all his property, and yields control of it to one or more of his creditors. The facts of that case called for no decision which would support counsel's contention in this one.

There was there a formal voluntary assignment, and the question was whether judgments given to favored creditors after the debtors had formed the determination of making such assignment, with the intent of preferring such creditors, were to be treated as part of the assignment. But aside from the rule that the language of an opinion is to be confined to the facts of the case which the court is considering, it will be found that the learned and discriminating judge who wrote it, in that case carefully avoided the implication that preferential transfers by an insolvent debtor, not connected in act and intent with an assignment, were forbidden by the law. It is in the opinion stated in terms that "this act does not assume to interfere in the slightest degree with the action of a debtor

while he retains the dominion of his property. Notwithstanding this act he may now, as heretofore, in good faith sell his property, mortgage or pledge it to secure a *bona fide* debt, or create a lien upon it, by operation of law, as by confessing a judgment in favor of a *bona fide* creditor."

Confessing a judgment in favor of one creditor will create a lien on all the property of the debtor, and to satisfy such judgment may exhaust all the assets of the debtor and leave him without any property to apply to his other debts. If he may confess judgment in favor of one creditor, why may he not do so in favor of a dozen, and if such judgments are confessed for debts *bona fide due*, how can the knowledge on the debtor's part that his entire estate will be required to discharge such judgment debts, or his intention to create a preference in favor of such creditors over others, by confessing judgments, render his act fraudulent? He has done in good faith that which the common law always permitted him to do, and what the Supreme Court has said the statute does not assume to interfere within the slightest degree. But it is said that the court declared the act is remedial, and to be liberally construed, so as to suppress the mischief and advance the remedy. True, but the mischief was *preferences by assigning creditors* and hence preferences in assignments were forbidden, and the liberal construction was adopted to effectuate the legislative intent by preventing the assigning debtor from giving preferences by resorting to transfers in other forms, made at the same time with or in contemplation of the assignment itself. Hence the court said that when the debtor "reaches the point where he is ready and determines to yield the dominion of his property, *and makes an assignment for the benefit of his creditors*, under the statute, this act declares that the effect of such assignment shall be the surrender and conveyance of all his estate, not exempt by law, *to his assignee*, rendering void all preferences and bringing about the distribution of his whole estate equally among his *bona fide* creditors." And further speaking of the act, "no insolvent debtor, having in view the disposition of his estate, can be permitted to defeat its operation by effecting unequal distribution of his estate *by means of an assignment*,

and any other shift or artifice under the forms of law." I italicize words in the foregoing quotations, to emphasize the fact that the writer who so happily formulated and so clearly expressed the opinion of the court, had clearly in mind the distinction between an assignment and a transfer of some other form, and clearly recognized the difficulty of treating a judgment or conveyance as an assignment or part of an assignment, and void, if preferential, when no assignment was ever executed or contemplated by the debtor who gave such preference.

The act regulates the conduct of assigning, not of insolvent debtors. We have no involuntary assignment law, and we know of no principle of law operative in this State that limits or controls an insolvent debtor in the distribution of his assets provided they are applied in discharge of *bona fide* debts. That the true meaning of this voluntary assignment act is the one here taken by us is further and clearly shown by the case of *Schroeder v. Walsh*, 120 Ill. 402, the opinion in which was written by the same judge who wrote in *Preston v. Spaulding*, and was filed on the same day as the opinion in said last mentioned case. There, an instruction was given which stated to the jury that "if a man finds himself in failing circumstances, he has a right to prefer one creditor to another; to so dispose of his property that one of his creditors shall receive his pay in full, and another receive nothing; nor is there any presumption of fraud in so doing." This proposition was assigned as error, and in approving it the court said: "In the absence of any bankrupt law or statute to the contrary, the law is well settled, that a debtor in failing circumstances, not seeking the benefit of the general assignment law, may prefer one creditor to another equally meritorious, if done in good faith. * * * The statute relating to assignments by debtors for the benefit of the creditors prohibiting preferences in such assignments, has no application to a case of this kind. Notwithstanding that statute a debtor may pay one creditor in full either in money or by sale of his property. That act applies only to conveyances of property to an assignee or trustee in trust, to convert the same into money for the ben-

efit of creditors of the assignor, which can now only be made under that law."

Counsel seeks to avoid the effect of this decision on the ground that the case was at law, and that the jurisdiction to administer the equity of creditors arising on acts done in fraud of the law rests in chancery. But titles made in fraud of the law are void at law as well as in equity. Besides, the act created no new head of equity jurisdiction and we are at a loss to know to what head of equity the administration of insolvent estates is to be assigned.

To give to this act the scope and effect here contended for would be to far exceed the legislative intent. It is held in *Farwell v. Cohen*, *supra*, that the act contemplates no such thing as a constructive assignment, and that before the County Court gets jurisdiction, an actual assignment must be made and recorded as required by the act. It must follow that before a court of equity has jurisdiction to prevent frauds upon the act, and treat transfers made upon the liens created as parts of the assignment, there must be the execution of an instrument in whatever form which creates a trust for the benefit of creditors.

For the court to take the administration of the insolvent's estate and enforce an equal distribution of it among his creditors, because he has himself distributed it, in payment to some and to the exclusion of others, where no trust or assignment for the benefit of creditors is made or intended by him, would be to carry the statute far beyond the line which limits the most liberal construction, and to enter on the domain, forbidden to this court, of judicial legislation.

The case of *White v. Cotzhansen*, 129 U. S. 329, is pressed upon our attention by counsel for appellants, as being a decision of the Supreme Court of the United States which fully sustains the construction of the law for which he contends. It must be admitted that the case cited does support appellants' view, and we shall not attempt to distinguish said case from the one here presented. Much as we respect the conclusions of that learned court, we are, upon questions involving the construction of statutes of our own State, bound

by the decisions of our Supreme Court. If our court had not, as we conceive it has, already made its construction of the voluntary assignment act plain, we should nevertheless find great difficulty, as will appear from what we have already said, in assenting to the view taken in *White v. Cotzhausen*. It would serve no useful purpose to discuss cases decided by courts of other States and cited by counsel in further support of this contention. They are nearly all made in view of peculiar statutes in the respective States where they were rendered, and do not serve to illustrate the law of this State.

The decree of the court in dismissing the bill was correct and will be affirmed.

Judgment affirmed.

GARY, P. J., dissenting. I think that *White v. Cotzhausen* is the logical sequence of *Preston v. Spaulding* and ought to be followed. I see no mode short of that there adopted to prevent a total disregard of the object and spirit of the voluntary assignment act.

35 174
64 155

CHICAGO FORGE AND BOLT COMPANY

v.

OCTAVE SANCHE ET AL.

SAME

v.

JOSEPH P. HEDGES.

Nuisances—Manufacturing Establishments—Permanent Injury—Temporary Disturbance—Adjacent Property—Increase in Value—Evidence—Instructions.

1. It is a rule of law in this State, that for a nuisance, permanent in its character, affecting the value of adjacent property if continued, the owner of such property may accept and ratify the feature of permanency, sue once for all, and recover his whole damages, instead of being driven to successive suits.

Chi. Forge & Bolt Co. v. Sanché.

2. Such property owner may bring an action for temporary disturbance, or permanent loss, but not upon both grounds, and if suit is brought for the latter reason, the lesser claim becomes merged therein.

3. In the case presented it is *held*: that it was improper for the trial court to exclude instructions offered on behalf of the defendants, the same setting forth that if the operation of the establishment in question had increased the value of the property claimed to have been injured, in excess of damage done, no recovery could be had.

[Opinion filed December 24, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. W. A. FOSTER, for appellant.

The declaration contained no count for any continuous injury; the gravamen of the suit was the creation and not the continuance of the nuisance, and any recovery for the continuance of the nuisance was not warranted by the declaration. The court should not have refused appellant's instruction so limiting it—instruction No. 12. *McConnel v. Kibbe*, 29 Ill. 483.

The plaintiffs having elected to treat defendant's works as a permanent nuisance, their damages must be determined by the rules which govern actions for such kinds of nuisance, for if the nuisance is a continuing one then only past damages up to the time of bringing suit are recoverable; but if the nuisance is a permanent one, then prospective as well as past damages are recoverable, and the claim in this case being based on the permanency of the nuisance, then the suit is in the nature of a condemnation suit and the same rule of damages applies—that is, the depreciation in the value of the property, and no allowance could be made for damage to its enjoyment. 3 *Sutherland on Damages*, pages 413, 414; *Whitmore v. Bischoff*, 5 Hun, 176; *Bare v. Hoffman*, 79 Penn. St. 71; *C. & E. I. R. R. Co. v. Loeb*, 118 Ill. 203; *Ottawa Gas Light Co. v. Graham*, 28 Ill. 73; *C., R. I. & P. R. R. v. Carey*, 90 Ill. 514; *C., B. V. P. R. R. v. Andrews*, 26 Kansas, 702; *C. & E. I. R. R. Co. v. McAuley*, 121 Ill. 161; *C. & A. R. R. Co. v. Maher*, 91 Ill. 312; *C. & I. R. R. Co. v. Baker*, 73 Ill. 316.

The question is, what was the value without the adjoining nuisance and what was the value with it; the difference is the measure of damages. *Francis v. Schoelkoff*, 53 N. Y. 152; see also *Langfeldt v. McGrath*, 33 Ill. App. 158.

Mr. EDWARD MAHER, for appellees.

GARY, P. J. These cases are similar in their features, and involve the same principle, so that it will save labor to discuss them together. The appellants have a large plant, operate powerful machinery, make a great deal of noise, emit a great deal of smoke, jar the neighborhood and sprinkle it with condensed steam; at least the appellees say they do.

The appellees are owners of dwelling houses near the works, and allege disturbance in the enjoyment and diminution in the selling value of their respective premises. In this State there has been a departure from the ancient law as to nuisances, by which ample and complete justice can be done at one stroke, instead of requiring, as the ancient law did, incessant hostilities, until endurance was outworn, as the price not only of indemnity for the past, but security for the future. It is now the law of this State that for a nuisance, permanent in its character, affecting the value of adjacent property if continued, the owner of such property may accept and ratify the feature of permanency and sue once for all, and recover his whole damages, instead of being driven to successive suits for damages sustained by the disturbance of enjoyment up to the commencement of the suit. One recovery in such a suit is a bar to further litigation. *C. & E. I. R. R. v. Loeb*, 118 Ill. 203, contains a very full statement of the whole doctrine. That case holds, that as to the inconveniences resulting to the vicinage, from the proper operation of a railroad upon a public street, the damages are entire, and accrue when the road is put in operation, and the adjacent property holder can not maintain successive actions for the temporary disturbance of enjoyment. See also *O. & M. Ry. v. Wachter*, 123 Ill. 440; *Swartz v. Muller*, 27 Ill. App. 320. It is not necessary to go to that extent in applying the doctrine to manufact-

uring establishments, in this case, though there may be equal reason for it.

Whatever results from the proper operation of a railroad is considered permanent, because the road is of no use if not operated; the same is the character of the appellant's works. But assuming that the property holder may elect between temporary disturbances and permanent loss, he must take one or the other, and not both.

The appellees in both these cases, by their declarations and by evidence, sought to recover the diminution in value—selling value—of their property. True, they offered evidence, too, of the daily inconvenience, but that was competent to assist the jury to fix the permanent loss. Much of that evidence related to the condition of the works and surroundings since the suit was commenced, which was probably competent for the same purpose, but not otherwise. The appellee, then, did seek to recover once for all, and in that greater claim the lesser one, for temporary disturbance, is merged. Whether there was, in fact, any diminution in the value was the subject of conflicting testimony. Opinions of witnesses seemed to accord with those of the party who called them.

In such a case each party is entitled to proper instructions as to the law applicable to the state of facts which the evidence of the party tends to prove. *Riedle v. Mulhausen*, 20 Ill. App. 68.

In the *Sanche* case the appellants asked, and the court refused, this instruction:

"8. The jury are instructed that under the declaration in this case the plaintiff's claim of damages is made on the ground that the operation of defendant's works has depreciated the selling value of the property.

"If the jury believe from the evidence that since the operation of defendant's works the selling value of the plaintiff's property is higher than before, and that the operation of defendant's works has caused the greater portion of such increase of value in the plaintiff's property by reason of its nearness to the works, and that such increase in selling value caused by the defendant's works exceeds any damages ever

done to the plaintiff's property or their enjoyment of it by defendant's works, then the verdict must be for the defendant."

And in the Hedges case, this:

"9. Even if the jury believe from the evidence that the operation of defendant's works has caused smoke, noise, smells and jarring, and that such smoke, noise, vapor, smells and jarring caused to plaintiffs, in the enjoyment of their property, something besides a mere imaginary and whimsical injury, yet the jury are further instructed that under the plaintiffs' declaration they can not recover in this case, if the jury find from the evidence that the selling value of the plaintiffs' property has been increased by the operation of defendant's works, independent of a rise in similar property, to an amount in excess of any damage ever done by the operation of said works to plaintiffs or their property."

These instructions, if the views hereinbefore expressed are correct, ought to have been given.

The instruction, the refusal of which was approved by this court in the case of these appellants v. Major, 30 Ill. App. 276, went upon the theory that if the works of the appellants had contributed in any degree, however slight, to an increase of value, such contribution was an answer to all claims, however large. But these instructions go to the whole claim for diminished value, and the appellees have, by their election, limited themselves to that as their cause of action.

There are other questions in the cases, but very probably they will not arise on another trial.

The judgments must be reversed and the cause remanded.

Reversed and remanded.

CHICAGO, ST. LOUIS & PITTSBURGH RAILROAD COMPANY

v.

ALFRED H. GROSS, ADMINISTRATOR.

Master and Servant—Negligence—Personal Injuries—Failure of Foreman to Watch for Approaching Trains Agreeable to Promise—Evidence.

In an action brought to recover from a railroad company for the death of an employe alleged to have been occasioned by the failure of a superior servant to watch, as agreed, for approaching trains, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff.

[Opinion filed December 24, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Mr. GEORGE WILLARD, for appellant.

MESSRS. HYNES & DUNNE, and DUNCAN & GILBERT, for appellee.

GARNETT, J. John Kassimer Rabbitts was injured November 12, 1887, by a train of cars of appellant, and died of the injury the 27th of the same month. The judgment in this case was given to compensate his widow and minor children for damages which they are said to have suffered by his death. A reversal of the judgment is asked on the ground that the verdict is manifestly against the weight of the evidence. On the trial in the Circuit Court it appeared from the evidence of appellee's witnesses, that the deceased was in appellant's employ at the time he was injured; that he was one of the gang of men who were then engaged in relaying a railroad track for appellant, near Carpenter street, in the city of Chicago; that the gang were in charge of Philip Yoder, as foreman; that Yoder, observing the men were uneasy about the trains that were liable to be running over another of appellant's adjoining tracks, near which their work took them, told them, in substance, to attend to their work and he would look out for the trains; that afterward, and on the same day, while the deceased and several others were, in the course of their employment, about to lift a rail lying near the adjoining track, a train of appellant's cars running thereon from east to west, struck him and ran over his legs, making amputation of both of them necessary, and resulting in his death.

There is some conflict in the evidence as to the position of Rabbitts when he was struck. Several of the witnesses for appellee testified that his back was to the train, while only one witness for appellant states that he was facing the train. So far as we can discover these four men had equal opportunity for observing how he was standing, and nothing in the case makes the evidence of the one witness of appellant more reliable than of the three for appellee. The same three witnesses testified that Yoder gave no warning of the approach of the train. Yoder himself, although a witness, does not claim that he gave any notice. The questions of fact were properly submitted to the jury, and we can not say they decided them otherwise than the evidence required. So far as the law of the case is concerned it is governed by C. & A. R. R. Co. v. May, Adm., 108 Ill. 288.

No error is perceived, and the judgment is affirmed.

Judgment affirmed.

GEORGE OBERNE ET AL.

v.

MARY O'DONNELL.

Attachment—Malice—Agent—Ratification—Evidence—Instructions.

1. The mere fact that a person is acting as the agent of another in the collection of a debt, does not render the latter liable for his maliciously suing out an attachment.

2. The agent in such case is alone liable unless it can be shown that the principal in some manner aided, abetted, advised or consented to, or adopted or ratified such act.

3. While a principal may render himself liable for the tort of his agent by receiving and appropriating the fruits thereof, in order that such appropriation shall amount to a ratification so as to charge the principal, it is indispensable that he shall be shown to have had full knowledge of all the material facts and circumstances of the tort.

4. In an action brought to recover damages for the malicious suing out of, and levying an attachment on the property of the plaintiff, this court holds, that in view of the giving of erroneous instructions touching the rule of liability of principals for the torts of their agents, the judgment in her behalf can not stand.

Oberne v. O'Donnell.

[Opinion filed December 24, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. S. P. McCONNELL, Judge, presiding.

MESSRS. McCLELLAN, CUMMINS & MOULTON, and ROBERT MATHER, for appellants.

MESSRS. CASE, JUDSON & HOGAN and E. F. MASTERSON, for appellee.

MORAN, J. This was an action to recover damages for maliciously suing out and levying an attachment on the property of appellee.

Appellee kept a retail grocery, and was indebted to the firm of Oberne, Hosick & Co. for a small bill of goods purchased from them. The account was sent by the bookkeeper of Oberne, Hosick & Co. to a law firm for collection, with information that the matter required immediate attention. Appellant Little, a clerk for the firm of lawyers, was sent with the bill to find appellee and collect the same. He did not find appellee, but learned that she was out of town, and had gone to Omaha, and certain other facts and circumstances which he related to one of the firm of lawyers, and was by him directed to bring an attachment suit against appellee. Little made the affidavit for attachment and procured an attachment writ to be issued by a justice of the peace and caused the same to be levied by a constable on the stock and fixtures of appellee while she was still absent in Omaha. When the attachment suit came on for trial, appellee was present and defended the same with the result that the attachment was quashed, but the justice rendered judgment for the amount of bill, \$20.50, in favor of Oberne, Hosick & Co. and against appellee, and an execution was immediately issued and levied on the goods which had been seized on the attachment writ, and they were sold under said execution for a sum slightly less than the amount of the judgment. Appellee's evidence tended to show that the goods taken under the attachment, were worth from \$175 to \$185. There was a

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verdict and judgment in favor of appellee and against all the appellants in the court below for \$800.

In determining the case on the record as presented here, we do not deem it necessary to state all the facts in detail, nor to discuss all the points made by counsel for appellants as grounds for reversal; we content ourselves with the statement of such facts, and the discussion of such questions of law arising on the record as will make clear the errors on which we rest the reversal of the judgment.

There is no evidence in the record tending to show that Oberne or Hosick ever directed the bringing of the attachment suit, or that they, or either of them, had any knowledge that such attachment had been brought against appellee, or any attachment levied on her goods, before the commencement of this malicious prosecution suit against them.

Assuming, for the purpose of the present discussion, that Little acted maliciously and without probable cause in suing out the attachment against appellee, it does not follow that either of the other defendants are liable for such acts, nor can either be made liable unless it is shown that such one in some manner aided, abetted, advised or consented to, or adopted or ratified such act. The mere fact that Little was acting as the agent of said Oberne & Hosick in collecting the debt, will not make them liable for his act in maliciously suing out the attachment. "When the agent institutes a malicious prosecution of his own head, and without the instigation or direction of his principal, the latter will not be liable for the same, unless he adopts or continues the same with knowledge of all the circumstances." *Dally et al. v. Young*, 3 Ill. App. 39, and authorities cited.

Where an attorney at law authorized to collect a debt, acts maliciously in swearing out an attachment, his malice will not be imputed by presumption or implication to his principals, though the attorney himself is, no doubt, liable for the wrong. *Kirksey v. Jones*, 7 Ala. 622; *McCullough v. Walton*, 11 Ala. 492; *Wood v. Weir*, 5 B. Mon. 544.

It was contended, however, on the trial, that Oberne & Hosick became liable for the act of Little by ratification, in

receiving the money obtained by the sale of the goods which had been attached, and the court gave to the jury, at the request of plaintiff, the following instruction, numbered 2: "The jury are instructed, that if a tort or wrong is committed by an agent, in the course of his employment, while pursuing the business of his principal, and it is not a wilful departure from such employment and business, the principal will be liable for the act, if ratified by him by accepting the benefit thereof, even though he had no knowledge of the agent's act at the time." This is a very bad instruction. It is viciously misleading in its tendency, though abstract in form, because it confusedly mingles fragments of principles of the law of agency, in such a manner that, taken as a whole, the proposition which it states is utterly indefensible. The statement that the principal becomes liable for the tort of the agent if ratified by him by accepting the benefit thereof, even though he had no knowledge of the agent's act at the time, is directly contrary to the well established doctrine.

A principal may render himself liable for the tort of his agent by receiving and appropriating the fruits thereof, but in order that such appropriation of the fruits shall be held a ratification, so as to charge the principal, it is indispensable that he shall be shown to have full knowledge of all the material facts and circumstances of the tort. *Wilson v. Tuman*, 6 Man. & Gr. 236; 2 Hilliard on Torts, 411; *Mechem on Agency*, Sec. 148. This rule applies to contracts as well as to torts. *McCormick v. Nichols*, 19 Ill. App. 334; *Bensly v. Brockway*, 27 Ill. App. 410; *International Bk. v. Ferris*, 118 Ill. 465.

In addition to this statement of the rule of law in plaintiff's instruction above set out, the court erred in the same respect in modifying defendant's instruction numbered 8, which, as given, was as follows, the court's modifications being in italics:

"The court instructs the jury that the plaintiff can not recover against the defendants Oberne & Hosick unless she shows by a preponderance of the evidence that the said defendants directed or authorized the suing out of the writ of attachment therein, and that in so doing they were actuated with

malice toward the plaintiff and acted without probable cause; and if the jury believe, from the evidence, that the said writ of attachment was sued out by the attorney for said Oberne and the said Hosick without their knowledge, then the said Oberne and the said Hosick are not liable to the plaintiff herein, *unless they ratified the same by sharing in the benefit thereof subsequently.*"

Defendant's 13th instruction was given with the same improper modification, but should have been given as asked.

For error indicated, the judgment must be reversed and the case remanded.

Reversed and remanded.

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DIXON NATIONAL BANK

V.

JACOB SPIELMANN.

Negotiable Instruments—Notes—Partnership—Dissolution—Assumption of Debts of—Burden of Proof—Principal and Surety—Evidence—Instructions—Practice—Notice.

1. If in a given case there is a conflict of evidence on a material issue of fact, and the instructions given are found to be misleading and inaccurate, and a reviewing court can see that such erroneous instructions may have influenced the jury to the injury of the party assigning error upon them, the verdict must be set aside and the case remanded for a new trial.

2. In an action brought to recover upon certain promissory notes given to renew a prior indebtedness of a copartnership subsequent to the dissolution thereof, by one of its members who signed the firm name thereto, he having purchased the interests of the other partners, and agreed to assume the debts of such firm, this court holds, the contention being as to whether, when said notes were delivered, the officers of the bank receiving them knew of such dissolution, and that the firm debts had been so assumed, that, in view of the giving of erroneous and misleading instructions, the judgment for the defendant can not stand.

[Opinion filed December 24, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Dixon National Bank v. Spielmann.

Messrs. BALL & OAKLEY, for appellant.

Messrs. HOFHEIMER & ZEISLER, for appellee.

MORAN, J. This action was brought to recover on two promissory notes dated March 2, 1878, one for \$900, and the other for \$1,270, signed Spielmann, Dement & Pischel. The notes were executed by Dement and were given for renewal of a firm indebtedness which was owing from the firm of Spielmann, Dement & Pischel to the bank, but before the making of said notes the firm had been dissolved. Dement purchased from the other partners all their interests in the assets of the firm, and in consideration thereof agreed to assume and pay all debts then owing by the firm and to save and protect Spielmann and Pischel harmless therefrom.

The main issue of fact in the case was upon the question whether, at the time the bank received said notes signed by Dement with the firm name, in renewal of prior notes of the firm which were due, the bank or its agents knew of the dissolution of the firm and that Dement had assumed and agreed to pay the firm debts.

By said agreement, Dement had, as between him and appellee, become the principal debtor to the bank and appellee had taken the place of a surety. *Conwell v. McCowan*, 81 Ill. 285; *Chandler v. Higgins*, 109 Ill. 602.

The bank, at the time of the renewal, received from Dement interest in advance on the notes in suit for ninety-three days, and this constituted a good consideration for the renewal. Therefore if the bank knew of the dissolution agreement, its agreement to extend the time for payment to Dement was a discharge of appellee. *Brandt on Suretyship*, Sec. 23; *Oakeley v. Pasheller*, 10 Bligh, N. R. 548; *Smith v. Sheldon*, 35 Mich. 42.

On this main issue of fact in the case, the evidence is closely conflicting, and there is at least, doubt, as to the preponderance being with appellee. Dement, who was called as a witness by appellant, testified that at the time the notes in question were given, the bank officers understood the whole

situation exactly as it was, and that he explained to the parties who were running the bank the condition of affairs, but he says that he did not at that time consider the agreement he had made with his partners as a dissolution, but as an arrangement of embarrassed men to do the best they could under the circumstances. The officers of the bank, including the one who conducted the renewal transaction with Dement, testify that they had no knowledge or information at the time of the execution of the said notes that the firm had been dissolved, and did not learn said fact till long after, and that they were not informed by Dement of his agreement with his partners. There being this conflict of evidence on the material issue of fact, it was essential that the instructions given by the court to the jury should be perspicuous, accurate and clear; and where, in such a case, instructions are found to be misleading and inaccurate in the form in which the issue is submitted, and a reviewing court can see that such erroneous instructions may have influenced the jury to the injury of the party assigning error upon them, the verdict must be set aside and the case remanded for a new trial. *Stearns v. Reidy*, 18 Ill. App. 582, and cases there cited.

Counsel for appellant has not discussed the instructions in this case in either of his briefs, and does not in argument rely on or suggest any error in them, but as we find by the assignment of errors that he challenges the correctness of the instructions on the record, we are not at liberty to disregard errors therein. The defendant had the burden of proving that the bank had notice of the dissolution of the partnership and the agreement of Dement to pay the outstanding debts of the firm at the time the notes in question were given to the bank.

Whenever in the course of litigation it becomes necessary to affect a party with notice of a fact, the party who asserts the affirmative of a material proposition must take the burden of proving it. The judge refused an instruction asked by the appellant which correctly stated the rule as to the burden of proof, and of his own motion, gave to the jury, among others, the two following instructions:

"If you find from the evidence, that at or after the dissolution of the firm of Spielmann, Dement & Pischel, the defendant, Spielmann, authorized Henry D. Dement to sign the defendant's name to notes for the firm debts, and that said Dement, in pursuance of said authority, signed the notes dated March 2, 1878; if you believe from the evidence that the bank, through its officers, did not know, and could not, by the exercise of reasonable business diligence have known, that said firm was dissolved at the time of taking said notes of March 2, 1878, then you will find for the plaintiff on the notes of March 2, 1878."

"You are instructed that the burden of proof is on the bank, and it must establish its case by a preponderance of the evidence, and every material point on which the evidence does not preponderate in favor of the bank must be decided in favor of the defendant. In determining where the preponderance is you will consider all the facts and circumstances proven."

The first of these instructions requires the jury to find affirmatively, from the evidence, that the bank did not know and could not, by diligence, have known of the dissolution of the firm. It was either given in utter obliviousness of the difference between an affirmative and a negative, or it was intended that the jury should understand that the plaintiff had the *onus* on that question; and the last tells the jury in terms that every material point on which the evidence does not preponderate in favor of the bank must be decided in favor of defendant.

It would be difficult to draw instructions which would more completely reverse the attitude of the parties in relation to the principal issue which they were litigating or more effectually lift the burden from the one who had rightfully assumed it, and impose it on the other, upon whom it could not be laid without subverting well settled principles of jurisprudence governing the trial of suits at law.

Such instructions were clearly erroneous, and very likely misled the jury to the injury of appellant. *Brown v. The People*, 4 Gilm. 439; *Galena & Chi. U. R. R. Co. v. Loomis*,

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13 Ill. 548; *The People v. Price et al.*, 3 Ill. App. 16; *Williams v. Shup*, 12 Ill. App. 454; *P., D. & E. R. R. Co. v. Foltz*, 13 Ill. App. 535.

For the errors indicated the judgment must be reversed and the case remanded.

Reversed and remanded.

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ISRAEL P. RUMSEY AND AUGUSTIN C. BUELL

v.

J. H. NICKERSON, C. B. KENNEDY, INTERVENOR.

Attachment—Interpleader—Advances upon Consignments—Draft—Shipping Receipt—Delivery—Evidence.

1. Although a draft upon consignees in favor of one making advances is dishonored, the delivery of the shipping receipt to such person is equivalent to a delivery of the property in question.

2. In attachment proceedings involving a carload of flax seed, a third person claiming title thereto, it being shown that contracts had been entered into between him and the defendant touching advancements upon consignments, this court holds that the action in the premises of the bank-named, was simply as agent for the intervenor, its president, whose private means were alone involved; that the cancellation of the draft referred to by charging the same to defendant, cut no figure, as under one of the contracts previously entered into the seed was the property of the intervenor while he remained in possession thereof, and until advances were paid; that the drawing of the draft was merely a method of carrying out such contract, and declines to interfere with the judgment in his behalf.

[Opinion filed December 24, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Mr. JOSEPH B. LEAKE, for appellants.

The claim of the intervenor is that, under the agreements for lien or title, unacknowledged and unrecorded, he is the owner of property subsequently acquired, which was left in

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the possession of Nickerson, with privilege of sale when and to whom he pleased, against the rights of an attaching creditor in another State, to which the property has been sent.

As against these appellants, said agreements are void. "A *bona fide* creditor, who, under a judgment and execution, acquires a lien on property thus situated, occupies the same position, in all respects, as does a *bona fide* purchaser. Where the apparent owner of property thus acquired has the *indicia* of ownership, and may sell and pass a good title to a purchaser, without notice, a *bona fide* creditor may seize the property on execution, and sell it thereunder, and pass the title, not only against the apparent, but also the real owner. The creditor and purchaser stand on the same footing and each will be protected." *Van Duzor v. Allen*, 90 Ill. 499.

The lien of these instruments can not be claimed to be better than that of a chattel mortgage. A chattel mortgage is void if sale be permitted. *Davis v. Ransom*, 18 Ill. 402; *Read v. Wilson*, 22 Ill. 377; *Barnet v. Fergus*, 51 Ill. 352; *Greenebaum v. Wheeler*, 90 Ill. 296.

Subsequently acquired property is not held by a chattel mortgage or pledge. *Hunt v. Bullock*, 23 Ill. 324; *Gittings v. Nelson*, 86 Ill. 591; *Taylor v. Turner*, 87 Ill. 300.

Chattel mortgage is only lien from time of record. *Blatchford v. Boyden*, 122 Ill. 657.

Notice of chattel mortgage is not binding. *Frank v. Miner*, 50 Ill. 444; *Lemen v. Robinson*, 59 Ill. 115; *Sage v. Brown-ing*, 51 Ill. 217; *McDowell v. Stewart*, 83 Ill. 538.

And notice that is for purchase money with an agreement for a lien, is not valid. *Blatchford v. Boyden*, 122 Ill. 668.

The lien of said instruments is invalid by the law of Dakota. Sections 4379, 4657, 4384, 4330, 4345, 4394, 4397 Compiled Laws of Dakota, in evidence in record, pages 205 and 206.

The instruments are invalid under the law of Illinois. Statutes, Chap. 95, Sec. 1.

The intervenor claims that he is the owner of the property by virtue of the draft dated March 16, 1888, and the shipping receipt attached.

J. H. Nickerson the defendant, was the consignor of the flax

seed, and the shipping receipt was given to him as owner. At that time he had a deposit account in the Bank of Canton, which had not been overdrawn since December 31st. He owed nothing to the bank. A draft was drawn in his name as consignor (by his employe, Waldo) for \$500 on the consignees in Chicago, and the shipping receipt was attached to it. The amount of the draft, \$500, was placed to the credit of Nickerson's account. He might have checked it out, but he did not. The transaction was a loan by the bank to Nickerson of \$500 secured by the pledge of the receipt as a symbol of the property.

"The delivery of the bill of lading * * * was evidence of a contract that the property should be held by the bank as security for the advance made," and was a symbolical delivery of the property. *M. C. R. R. Co. v. Phillips*, 60 Ill. 197, 198; *W. U. R. R. Co. v. Wagner*, 65 Ill. 198; *Peters v. Elliot*, 78 Ill. 321; *Canadian Bank v. McCrea*, 106 Ill. 295; *Jones on Pledges*, Secs. 5, 7, 8, 10, 231.

A delivery of property without a written conveyance can not be a mortgage, but must be a pledge. *Jones on Pledges*, Sec. 5.

A pledge differs from a mortgage of personal property in being a lien on property and not a legal title to it. *Jones on Pledges*, Secs. 7, 8, 10.

The exact position of the bank is to be regarded as that of pledgee, etc. *M. C. R. R. Co. v. Phillips*, 60 Ill. 197.

The pledge was given to secure the Bank of Canton the payment of that specific \$500, and for that purpose it was a lien upon the property.

The draft was protested, and with the shipping receipt was returned to the bank. Nickerson's account was good for the amount and the draft was at once charged to him. Nickerson thereby paid the draft and it was filed away. That draft was paid and the lien to secure it was thereby released, and the property was Nickerson's and free from the lien. It was then in the possession of the sheriff under the attachment in this case, in favor of Nickerson's creditors, and they can hold it as Nickerson could, free from that lien.

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At the end of the month Mr. Kennedy says he took possession of the draft. "It was against grain of mine, and I retained it in my possession." He does not say how he got the shipping receipt—presumably by its being attached. The claim of the intervenor now is, that because he held a note of Nickerson for a debt due two and a half months before to him, that he can take possession of this draft for a different debt to the bank and transfer the lien to secure the draft after its payment and make it secure a note payable to him, and thereby make him the owner of the property, as against the attaching creditors. The bank itself could not have held the pledge as security for the payment of any other indebtedness to it, than the one it was given to secure. Story on Bailments, Sec. 304; 2 Kent's Commentaries, p. 584; Woolly v. Louisville Banking Co., 81 Ky. 527; Morris v. Tillson, 81 Ill. 607; Baldwin v. Bradley, 69 Ill. 32; Jones on Pledges, Sec. 551.

Messrs. FLOWER, SMITH & MUSGRAVE, for appellee.

GARNETT, J. The defendant, Nickerson, a resident of Canton, Dakota, was engaged in purchasing at that place, and shipping to Chicago, grain and stock. In the course of his business he became indebted to appellants, and the amount of the debt on March 20, 1888, being \$751.54, on that day they commenced an attachment suit against him, and levied the writ on a carload of flax seed, which had been shipped to Chicago by him.

There was a judgment by default against him for \$796.63, but C. B. Kennedy appeared in the suit and by interplea claimed the flax seed as his property. The issue formed on the interplea was tried by the court without a jury, finding and judgment entered for Kennedy, and appeal by plaintiffs.

Kennedy's title grew out of these facts: He was president of the Bank of Canton, with which Nickerson commenced to transact his business on October 15, 1887. By written contract of that date between Kennedy and Nickerson, it was provided that in consideration of Kennedy furnishing him money to buy grain and stock in the city of Canton, said Ken-

nedy should have a lien upon all stock and grain bought by Nickerson, for the payment of all advances that might be made by the Bank of Canton or Kennedy; that all grain should be shipped in the name of Nickerson, who should draw for all proceeds of grain shipped through the Bank of Canton, the drafts being placed to his credit; that he should pay to the bank or to Kennedy seventy-five cents per thousand for all moneys paid out upon his check or orders or his account, and pay twelve per cent per month upon all daily balances against him caused by overdrafts. By another written contract made afterward, and about October 29, 1887, Nickerson agreed, in consideration of Kennedy furnishing money and directing the bank to pay his (Nickerson's) checks, that all grain bought by him since October 16, 1887, "is the property of said C. B. Kennedy;" that "all grain stored in granaries or in transit is the property of said C. B. Kennedy until all moneys advanced by said C. B. Kennedy are fully paid;" that Nickerson should have the right to ship all the stock and grain in his own name, to such parties as he might select; that drafts for proceeds of such shipments should be made through the bank and placed to his credit and all of his checks for grain or stock charged to him; that the intention was that all money to purchase such stock or produce, should be furnished by Kennedy, and the property should be his until the money was repaid with twelve per cent interest, and seventy-five cents per thousand for exchange, and that Nickerson should have all the profits and bear all the losses; that it was the intention that out of the proceeds of such sales the money advanced for the purchase of said grain and stock should be first paid to Kennedy through the Bank of Canton; that Nickerson should account to Kennedy the full amount of sales of all grain made up, to the amount of money furnished and interest and exchange as stated. Neither of these contracts was acknowledged or recorded.

From October 15, 1887, to March 20, 1888, the account on the books at the bank representing these grain transactions, was kept under the title of "J. H. Nickerson grain account," and a separate account was kept with Nickerson for his other

business. Checks to pay for grain were not in the ordinary form, but were tickets, giving the name of the seller, the number of bushels of grain and the price per bushel. About January 1, 1888, Nickerson was found overdrawn on the grain account, something over \$2,000, which was then settled by Kennedy giving his check to the bank for the amount and receiving from Nickerson his note for the same amount; after that time the business between Nickerson, Kennedy and the bank continued as usual, but there appears to have been no subsequent overdraft on that account.

The car of flax seed in question was purchased a few days before it was shipped to Chicago. Nickerson testified that it was purchased with money which he drew from the Bank of Canton, but he could not swear whether the money was really furnished by Kennedy or the bank. Kennedy testified that it was his money that was furnished Nickerson, and of this we find no contradiction. When the flax seed was shipped, a draft for \$500 was drawn by Nickerson against it, on the consignees, to the order of the bank, the shipping receipt being attached thereto, and the \$500 credited to the "J. H. Nickerson grain account." Before the draft was presented for payment, appellants had caused their attachment writ to be levied on the seed, and the draft being dishonored on presentation, was returned to the Bank of Canton and the amount thereof charged to the "J. H. Nickerson grain account." The draft itself was filed away, but the shipping receipt was retained and afterward came into the possession of Kennedy. The flax seed was sold by order of the trial court, and it is admitted that the proceeds of sale are not sufficient to pay the balance due Kennedy on advances made under the two contracts.

Appellants contend that the transaction, when the flax was shipped, was in substance a loan of \$500 by the bank to Nickerson, secured by the pledge of the receipt as a symbol of property; that when the draft, after payment refused, was charged up against the grain account, the lien was released; that Nickerson then had the right to take it and his attachment creditors can hold it just as he could. But we think

it evident that the grain account was not Nickerson's account with the bank, but Nickerson's account with Kennedy; that the bookkeeping was done by the bank and its only interest in the transaction was in the exchange of seventy-five cents per thousand dollars; that the credit of the \$500 to the grain account was a credit given by Kennedy to Nickerson, and the charge of the amount of the dishonored draft was a charge by Kennedy against Nickerson. It is true the draft was thereby canceled, but the delivery of the shipping receipt was equivalent to delivery of the property. *M. C. R. R. Co. v. Phillips*, 60 Ill. 190; *Peters v. Elliott*, 78 Ill. 321; *Taylor v. Turner*, 87 Ill. 296; *W. U. R. R. Co. v. Wagner*, 65 Ill. 197.

The bank was but the agent of Kennedy in all the transactions with Nickerson. It received the symbolical delivery of the property for Kennedy, and as long as it retained the shipping receipt it was kept for his benefit. After the \$500 draft was charged up against the grain account, Nickerson was not entitled to possession of the flax seed. If he had demanded possession, Kennedy could have resisted his claim by setting up the second written contract between them, which provided that the grain was to be the property of Kennedy until all moneys advanced by him were repaid. Under that contract Kennedy had the right to be paid the money advanced by him for the purchase of grain, and though the draft for \$500 was canceled by charging it against the grain account, neither Nickerson nor any one claiming under him could, directly or indirectly, divert the proceeds of the flax seed so as to avoid the effect of the contract, so long as Kennedy remained in possession of the property. The drawing of the draft was merely a method of carrying out that part of the second contract which gave Kennedy the right to payment of his advances out of the proceeds of the sale of the flax seed, and that method failing, he could defend his possession against an attack that threatened to deprive him of the benefit of the contract.

No propositions of law were requested of the court, and the evidence sustains the finding. The judgment is affirmed.

Judgment affirmed.

COLLINS D. WHITE
v.
WILLARD P. ALWARD.

35 195
54 528

Negotiable Instruments—Note—Power of Attorney—Alterations—Blanks—Filling of.

1. The delivery of commercial paper, with unfilled blanks, carries with it authority to fill the same, and the rule applies to powers of attorney attached thereto.
2. In the absence of an agreement to the contrary, a holder can only fill such blanks as the context shows they should be filled, and where it does not show, they must be filled with regard to what is reasonable under the circumstances.
3. If in such case the amount inserted as attorney's fees in a power of attorney is excessive, it may be reduced to what is reasonable.

[Opinion filed December 24, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Mr. LOUIS SHISSLER, for appellant.

The law is well established, that where a person signs his name to a bill or note, leaving a blank for a sum, and gives it to another person, and a sum is inserted in the blank space, and the bill or note is sold or transferred, the maker can be held liable on the note. The signing and delivery of the note with the blank for a sum, is held to confer authority on the person to whom it is delivered, to insert an amount. In *Young et al. v. Ward*, 21 Ill. 225, the court say:

“It is the settled doctrine, that if a party signs his name to a blank paper, and delivers it, with authority to fill the blank space above his signature with a note or bill for a particular amount, or to a specified person, and the person receiving it fills it for a larger amount, or to a different person, and it is passed in the course of business, without notice of the facts,

the maker is bound by the instrument. And so of a note or bill already filled up and intrusted by the maker or drawer, to be delivered for a particular purpose or to a particular person, or on a contingency, and the instrument is negotiated contrary to the intention of the maker, to an innocent person. It is the duty of the maker to see that his negotiable paper does not improperly get into circulation, and failing to do so, he must suffer the consequences of his negligence."

In 1st Vol. Parsons on Bills and Notes, 2d Ed., p. 109—"Where a person signs his name to a bill or note, leaving a blank for a sum, and intrusts to another, this is *prima facie* evidence of authority to insert an indefinite sum."

We claim that the fact of the signing this power of attorney to confess judgment, with blank spaces, and delivering it, sending it afloat as commercial paper, gave authority to any holder of it, to fill up these blank spaces.

We have been unable to find any decision of the precise point involved in this suit. The decision of *Burwell v. Orr et al.*, 84 Ill. Rept. p. 465, was in regard to the alteration of a power of attorney to confess judgment, which provided for three dollars attorney's fees, and inserting the word "hundred" after the word "three," thereby changing the words "three dollars" to "three hundred dollars." In that case there were no blank spaces to be filled. The amount of attorney's fees was fixed, and written three dollars. To change three dollars into three hundred dollars was a material alteration. There is a clear distinction between filling up a blank space, and the material alteration of an instrument which changes and alters fixed amounts. The filling up of a blank space in a note or paper is one thing; the alteration of figures is another and different thing. The same argument that would be used against the right to fill up the blank space in this power of attorney by inserting the word "fifty," could likewise be urged against the right to fill up the blank space for the amount in a promissory note.

The language used by the Supreme Court of Illinois, in *Young et al. v. Ward*, 21 Ill. Rep. 225, is decisive of this question. "It is the settled doctrine that if a party signs his

name to a blank paper and delivers it with authority to fill the blank space above his signature with a note or bill for a particular amount, or to a specified person, and the person receiving it fills it for a larger amount or to a different person, and it is passed in the course of business without notice of the facts, the maker is bound by the instrument."

Now the whole includes all its parts. If the party to whom it is delivered could fill up the entire blank paper over the signature, he certainly could fill up spaces where it is not a blank paper, but a paper with a printed power of attorney, with spaces in blank.

The authority implied by one signing a blank paper, is an extensive authority. In 1 Daniel on Negotiable Instruments, Sec. 144, second edition, it is stated:

"The authority implied by one signing a blank paper is so extensive that such paper will be valid in the hands of a *bona fide* holder, whether it be framed as a negotiable instrument or otherwise."

MR. CHARLES S. BURTON, for appellee.

GARY, P. J. This case presents an important question, though in itself it is of small importance.

The appellant acquired the instrument copied below, before maturity, in good faith, and for value. It had passed through the hands of one Smith, under an indorsement in blank of the payee.

While Smith held it, he filled certain blanks with the words in italics in the copy. The blanks were filled in a different handwriting, and with ink different from the other writing on the paper, but the appellant had no notice in fact that the instrument had been added to since the appellee parted with it. It is as follows:

"\$100.

CHICAGO, Nov. 8, 1887.

"On Nov. 15, 1887, after date, for value received, I promise to pay to the order of C. A. Kamper, one hundred dollars, at 160, 162 and 164 Ogden Ave., with interest at 8 per cent. per annum after due, until paid, and to secure the payment of

said amount *I* hereby authorize irrevocably, any attorney of any court of record to appear for *me*, in said court, in term time or vacation, at any time hereafter, and confess a judgment without process, in favor of the holder of this note, for such amount as may appear thereon, together with costs and *fifty* dollars attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that *my* said attorney may do by virtue hereof.

"P. P. ALWARD."

The case of *Burwell v. Orr*, 84 Ill. 465, does not settle this. It is, perhaps, inferable that the plaintiff there held for value and without notice, but it is not stated.

What the appearance of the instruments was on their face is not shown. There is no reference to the principles by which the holder of such an instrument is protected, if he is entitled to protection. Why the rules followed in *Yocum v. Smith*, 63 Ill. 321, did not apply, does not, in terms appear. In this last case, the familiar rule, that a *bona fide* holder of commercial paper for value, before maturity, is not defeated by alterations which could not be detected, and which the negligence of the maker furnished facilities for, is applied.

If the blank filled with fifty had been a space following the word hundred, the appellee would have been liable to pay the added fifty. But this is not a case of alteration; the spaces were wholly blank and the delivery of commercial paper in that condition is authority to the holder to fill the blanks. *Tiedeman on Com. Paper*, Sec. 283; 1 *Dan. Neg. Ins.*, Sec. 142; 1 *Pars. B. & N.* 33.

Nor is the execution of such authority confined to commercial paper. *Bish. Con.*, Sec. 1174; *Jewell v. Rock River Co.*, 101 Ill. 57.

It is reasonable to apply the same rule to the power of attorney part of the instrument, as well as to the promissory note part, as was done in *Vliet v. Camp*, 13 Wis. 198.

In the absence of express agreement the holder probably could only fill the blanks as the context showed they ought

Chicago Hansom Cab Co. v. McCarthy.

to be filled, or where the context furnishes no guide, for example, the amount of attorney's fees, then with what was reasonable. But if an excessive amount is put in, it is not an alteration. The authority existed and has been exceeded. The consequence, at the worst, for the holder, is that the excess is void. *Johnson v. Blasdale*, 1 S. & M. (Miss.) 17; *Goss v. Whitehead*, 33 Miss. 213.

It is a question of fact whether \$50 as an attorney's fee, is excessive, and if it is, then the amount should be reduced to a reasonable one, and the promissory note part of the instrument remains valid.

The judgment of the Circuit Court having been that the whole instrument is void, it is reversed and the cause remanded.

Reversed and remanded.

CHICAGO HANSOM CAB COMPANY

V.

JOHN MCCARTHY.

Master and Servant—Negligence of Servant—Injury to Third Person—Evidence.

This court declines to interfere with the verdict for the plaintiff in an action brought to recover for personal injuries alleged to have been suffered by him, through the negligence of one of defendant's servants.

[Opinion filed December 24, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

Messrs. MONROE & McSHANE, for appellant.

Mr. GEORGE H. KETTELLE, for appellee.

GARY, P. J. The verdict of a jury on the question of negligence where, in a thronged street, the driver of a cab in endeavoring to get in toward the head of a line of teams waiting for the closing of a bridge, strikes a man in the back with one of the shafts of a cab, and injures him, is generally conclusive. Where there is no error in law and there is enough evidence to sustain the verdict, there is no escape from it on the ground merely that there is conflicting evidence. The judgment is affirmed.

Judgment affirmed.

PATRICK HEFFRON

V.

FLOWER, REMY & HOLSTEIN.

35	500
82	430
35	200
183	102

Practice—Receiver—Employment of Counsel for Complainant by—Fees—Payment of—Master's Report—Exceptions—Partnership—Dissolution of.

A receiver in proceedings touching the dissolution of a partnership should not employ the attorney of the complainant in the bill filed with that end in view.

[Opinion filed December 24, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Messrs. OSBORNE BROS. & BURGESS, for appellant.

"The courts have usually been adverse to allowing a receiver to employ as his counsel the counsel of either party to the cause, when there are conflicting interests. And when counsel for the plaintiff, in an action for a dissolution of a partnership, had also acted as associate counsel to the receiver, the court refused to allow a claim for compensation for such services." *Adams v. Wood*, 8 Cal. 306; *Merchants etc., Bk. v. Kent*, 43 Mich. 292, 297; *High on Receivers* (2d Ed.) Sec. 216.

In *Baker v. Backus*, our own Supreme Court said : " There was a fatal objection to the person appointed as receiver. He was not disinterested; he was the legal adviser of the complainant, and framed the bill. * * * All these disqualified him, and he should not have been appointed." If the legal adviser of complainant could not act as receiver he could not act as attorney to the receiver. *Baker v. Backus*, 32 Ill. 79, 115.

" The practice in equity does not permit the receiver to employ a solicitor in the case as his own counsel, lest it might disarm his vigilance in watching the receiver's proceedings." (Citing *Ryckman v. Parkins*, 5 Paige, 543; *Adams v. Woods*, 8 Cal. 306.) *Merchants, etc., Bank v. Kent*, 43 Mich. 292, 297; *Benneson v. Bill*, 62 Ill. 409, 411.

" The solicitors of the several parties are bound in duty to their clients to watch the proceedings of the receiver, and to see that he faithfully discharges his trust. The undertaking to act as the solicitor or counsel of the receiver under such circumstances would, therefore, frequently cast upon the person thus assuming to act, inconsistent and conflicting duties, both of which could not be properly discharged by the same person. As between party and party, the counsel for the complainant has, in no case, a right to be paid extra counsel fees out of a fund belonging (in part) to a defendant, except where the counsel has been employed *to obtain or create such fund* for the joint benefit of both parties. * * * The application for counsel fees must therefore be rejected." *Ryckman v. Parkins*, 5 Paige, 543, 545; *Merchants, etc., Bank v. Kent*, 43 Mich. 292, 297.

" The same reasons which suffice to render the legal adviser of one of the parties to an action ineligible to be appointed receiver (see *Baker v. Backus*, 32 Ill. 79, 115; *Benneson v. Bill*, 62 Ill. 409, 411; *Merchants, etc., Bk. v. Kent*, 43 Mich. 292) also operate to prevent him from being allowed to act as counsel for the receiver. Besides, his interest in the final result of the controversy, his duty to protect and enforce the rights of one of the parties will, in most cases, if he should act as counsel for the receiver, be likely to

impose upon him conflicting and inconsistent duties such as can not be properly performed by one person." Beach on Receivers, Sec. 262; High on Receivers (2d Ed.), Sec. 216; Adams v. Woods, 8 Cal. 306; Merchants, etc., Bk. v. Kent, 43 Mich. 292, 297; Blair v. St. Louis, etc., Ry., 20 Fed. Rep. 348, 349; Matter of Ainsley, 1 Edw. Ch. 576; Ray v. Malcomb, 2 Id. 165; Ryckinan v. Parkins, 5 Paige, 543; Moore v. O'Loghlin, 3 Law Reports (Ireland), 405, 407.

Receiver should not retain the counsel of either party, especially where their interests conflict, because the receiver's counsel should be entirely disinterested in the matter; and where he does retain the counsel of either party, the court may refuse to credit him with their fees. Beach on Receivers, Sec. 751; High on Receivers (2d Ed.), Sec. 216; Adams v. Woods, 8 Cal. 306.

"It is urged that the attorney for the plaintiff (in a suit to foreclose a mortgage) should be authorized to act for the receiver, inasmuch as the plaintiff is specially interested in defeating all claims adverse to plaintiff's rights and securing an economical administration of the estate. To this it must be answered that he represents his own client, and the latter can employ him and pay him accordingly if desired, but can not fasten his compensation on a fund in which he has not the *sole* interest, but only a partial or adverse interest. His appointment might be wholly inconsistent with his duties as plaintiff's counsel." Blair v. St. Louis, etc., Ry., 20 Fed. Rep. 348, 349, per Treat, J.

Mr. HARRISON MUSGRAVE, for appellees.

Section 217 of High on Receivers, 2d edition, being the section immediately following the one to which counsel for the appellant have referred, reads as follows:

"It is to be observed, however, that the rule, as above stated, prohibiting a receiver from employing the counsel of either party in the cause, is limited in its application to cases where the receiver is acting adversely to one of the parties to the litigation, since it is only in such cases that there can be any impropriety in the employment of such counsel by the

receiver. And the rule is intended only for the protection of the rights of the parties themselves, and can not be invoked by a stranger to the original action in which the receiver was appointed. Where, therefore, no objection is urged by such parties, the receiver may employ the counsel of either of them to aid him in the discharge of his trust."

We quote also from section 262, being the same section referred to by counsel in *Beach on Receivers*, and giving the balance of the section, which reads as follows:

"This rule, prohibiting a receiver from employing the solicitor of either of the parties to the suit in which he is appointed, is intended to protect the rights of all the parties; and, if they do not object, the receiver may employ the solicitor of either party to aid him in the discharge of his trust."

And section 263, by the same author, reads as follows:

"So far as this rule rests upon the diversity of interest of the parties, it has been modified by the courts in such a way that a receiver may without impropriety be represented by the attorney of a party, unless the interests of the receiver and such party are adverse. In a late case, the court, referring to the decision last cited in which this position was taken said: 'The general rule that a receiver should not employ the counsel of either of the parties to a litigation in which he is appointed is subject to certain limitations. It is only when the receiver is acting adversely to one of the parties, that it has ever been supposed there was any impropriety in employing the counsel of the other.'"

There is nothing in this case to show that the receiver was acting adversely to either of the parties to this suit; and under this rule, there was no impropriety in the receiver's employing the solicitors of either party as his counsel. Moreover, it is apparent that, long before any application was made by appellees for compensation for their services as counsel for the receiver, the appellant was advised of the fact that they were so acting, and took no exception to it until after such application. It seems to us perfectly clear that up to the time objection was made, the receiver's counsel are entitled to compensation for their services.

GARNETT, J. January 9, 1889, James J. Gore by his solicitors, Flower, Remy & Holstein, filed his bill in equity in the Superior Court, alleging a partnership between himself and Patrick H. Heffron in certain leaseholds of lots in the city of Chicago, in the hotel buildings thereon, and in the hotel business carried on therein, and praying for a dissolution of the partnership and the appointment of a receiver, for the partnership business and assets. Heffron answered, denying the partnership and the facts relied upon by Gore for the appointment of a receiver.

On January 22d James H. Rice was appointed receiver by order of the court, and January 25th leave was given him to employ counsel. He employed Flower, Remy & Holstein, without notice (so far as appears) to Heffron or his counsel. Appellees presented to the court in June, a bill against the receiver for retainer, counsel fees, and \$1, paid for certified copy of the order of appointment. Over the objection of appellant, the petition was referred to a master, who reported that the sum of \$850 should be allowed the petitioners for their services. The report was confirmed and the receiver ordered to pay petitioners the sum of \$850. Appellant's rights in the premises were properly preserved by exception to the report. One of the exceptions calls in question the right of the receiver to employ the counsel of complainant in the bill. The record shows no withdrawal of appellees as counsel for Gore, and the latter testified before the master that they were then his attorneys. The differences between Gore and Heffron are not merely of a pecuniary nature, but they seem to involve much personal bitterness.

The counsel of the receiver in such a case should be as far as possible removed from the temptation to partiality. He should be free from that personal bias which might at a critical passage, induce him to give advice prejudicial to one of the litigants, when another course could have been adopted, consistent with the interests of both. The duty of complainant's counsel is to guard his interests at all times, and against all persons, by all honorable means. Faithfulness in their engagement to him can not be, if they are allowed to repre-

Heffron v. Flower, Remy & Holstein.

sent the receiver, and his duty required action that complainant disapproved. In that event, which client would appellees serve? It may be said that when such a dilemma is presented, they would choose one, and discharge themselves from obligation to another. If the dilemma was clearly seen, no doubt they would so act; but selfish interest is liable to conceal such difficulty, or to present it as a temporary matter, or as a thing of slight importance, and so the law saves the painful necessity of decision by forbidding the double employment. The rule is given adversely to appellees in *High on Receivers*, Sec. 216, where the author says, "The receiver should not employ the counsel of either of the parties to the litigation in which he was appointed, since, their duty being to protect the interests of their respective clients, and to watch the receiver's proceedings, to the end that a faithful performance of his duties may be insured, they are not regarded as competent to act as counsel for the receiver, and their undertaking to act in such a capacity might frequently cast upon them inconsistent and conflicting duties, which could not be properly discharged by one and the same person."

An apt illustration of the fitness of this rule is found in a query of the Supreme Court of California in *Adams v. Woods*, 8 Cal. 320: "Suppose that Adams" (complainant) "should wish to call in question the acts of the receiver in those very cases where Shafter & Park" (Park being complainant's solicitor) "advised and acted as his counsel." The petition there was by Edward Stanley, counsel employed by the receiver, for compensation for legal services rendered the receiver. In the account presented was an item for services of associate counsel, and the associate counsel were Shafter & Park. The claim for services of the associate counsel was denied, the court saying (p. 322): "The practice, if tolerated, would lead inevitably to the most melancholy abuses. Attorneys are officers of the court, and it is its highest duty to see that its own officers conduct themselves properly; and that this end may be obtained, the court should inflexibly discountenance every practice that may tend to bring reproach upon the administration of justice."

The Supreme Court of this State has held that the solicitor for complainant should not be appointed receiver in the suit. *Baker v. The Adm'r of Backus*, 32 Ill. 115; *Benneson v. Bill*, 62 Ill. 408; and in *Beach on Receivers*, Sec. 262, it is said: "The same reasons which suffice to render the legal adviser of one of the parties to an action ineligible to be appointed receiver, operate also to prevent him from being allowed to act as counsel for the receiver."

There may be an exception to the rule that controls this case, as where all the parties to the suit are advised of the employment of complainant's solicitor by the receiver, and expressly or tacitly consent thereto. But this record does not require any opinion on that point.

The decree is erroneous, and is reversed and the cause remanded.

Reversed and remanded.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
v.
CITY OF CHICAGO.

Municipal Corporations—Ordinance—Construction—Railroads—Permission to Lay Tracks—Viaduct—Injury to Private Property—Evidence—Damages.

1. The history of city council proceedings pending the consideration of an ordinance which is but a proposition, and is of no effect unless accepted by the party to whom it is made, can not be used to give force or meaning to the contract so made.

2. In an action brought by a municipality to recover from a railroad company the amount of a judgment recovered against it by a property owner injured through the construction of a viaduct by said company, the right to lay certain tracks having been granted it upon the understanding that it should pay the cost and expense of the viaduct in question and legal damages resulting, this court declines to interfere with the judgment for the plaintiff.

[Opinion filed December 24, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ARBA N. WATERMAN, Judge, presiding.

Messrs. DEXTER, HERRICK & ALLEN, for appellant.

Mr. FRANCIS ADAMS, for appellee.

MORAN, J. This case was tried before the Circuit Court without a jury, and the judgment appealed from rendered against appellant. We have read the arguments of counsel presented in the briefs filed herein, and given them, as well as the facts in the record, full consideration, and as a result we are inclined to concur with Judge Waterman in the conclusion which he reached on the trial below, and we therefore affirm the judgment on the following opinion rendered by him, which has been printed in the brief of counsel, and which disposes, in a manner satisfactory to this court, of all material questions in this case.

OPINION OF CIRCUIT COURT.

"This is an action to recover the amount of a judgment obtained by Nathan Mears against the city for damages caused by the construction of Polk street viaduct.

On the 20th of December, 1880, an ordinance was passed by the city council giving to the defendant permission to lay down and maintain certain railroad tracks upon specific conditions. The permission is granted to a special person to do that which but for the ordinance it could not do; this special permit is given upon certain conditions. The ordinance is not one of a general nature, by which all persons are permitted to do or forbidden to do; only the Chicago, Burlington & Quincy Railroad Company could exercise the permit, and it had the option to accept or reject the offer made to it. By its acceptance a contract was made by which the city gave a license, and the company agreed to do various things by way of payment therefor.

First, the company agreed to pay, or cause to be paid, to the city of Chicago, the cost and expense of constructing a new

viaduct on Polk street over the railroad tracks crossing said street, between Canal street and Polk street bridge, together with all proper lateral and other necessary approaches thereto, and to maintain and keep the same in repair, without expense and cost to the city of Chicago.

Section 4 of the ordinance is as follows :

‘The permission and authority hereby granted are upon the further express condition that the said railroad company shall and will forever indemnify and save harmless the city of Chicago against and from any and all legal damages, judgments, decrees and costs, and expenses of the same, which it may suffer or which may be recovered and obtained against said city, for or by reason of the granting of such privileges and authority, or for or by reason of, or growing out of, or resulting from the passage of this ordinance, or any matter or thing connected therewith, or with the exercise by said company of the privileges hereby granted, or from any act or acts of said company under or by virtue of the provisions of this ordinance.’

It is for the purpose of this suit established that Nathan Mears suffered damages by the construction of the Polk street viaduct, and that in consequence thereof he obtained a judgment against the city; but was the construction of the viaduct a thing which grew out of or resulted from the passage of the ordinance, or was the construction a matter or thing connected with the passage of the ordinance or with the exercise by the company of the privileges granted to it, or with any act or acts of the company, under or by virtue of the provisions of the ordinance?

It is said that as the ordinance does not direct the building of the viaduct, and its construction was not ordered by the city for some months after the passage of this ordinance, that its construction grew out of the subsequent action of the city; that notwithstanding the passage of this ordinance, the city might never have ordered that the viaduct be built; that therefore the most that the defendant undertook to do was to pay the cost of the viaduct whenever the city ordered it built, and to keep it in repair after it was built; that what

grew out of or resulted from the passage of the ordinance, or is connected therewith, was what was therein provided should be or might be, or what has been done by virtue of the authority granted by the ordinance; that the ordinance gave no permission to this company or anybody else to construct this viaduct; and there never was any such permission or authority until some time in the year 1881, and consequently that the company did not build the viaduct by virtue of this ordinance, and as regards the viaduct, has done and could do nothing whatever by virtue of this ordinance.

It is manifest that when this ordinance was passed and accepted, the construction of Polk street viaduct was contemplated by both the city and the company; the company must, when it made this contract, have considered that the building of this viaduct would result from, or grow out of, the passage of this ordinance, in which it expressly agreed to pay the entire cost and expense of construction; and if the building of this viaduct, which, so far as consideration to the city is concerned, is the principal thing spoken of in the agreement, is not connected with the passage of the ordinance, it would be difficult to say what is. It is true that there is not, in the ordinance, an order or agreement that the viaduct shall be built, neither is there an order or agreement that any railroad tracks shall be laid, or any train run thereon.

For aught that appears, the decision of the company to lay tracks and run trains may have been made long after the passage of this ordinance, but whenever made, the city could not say that the laying of the tracks and the running of the trains neither resulted from, or were in any way connected with, the passage of this ordinance.

By this ordinance the city granted to the defendant valuable rights and privileges, and as a consideration for this the company among other things, promised to pay all the cost and expense of constructing Polk street viaduct. For all that, in accepting this ordinance, the defendant promised to do, it received a consideration satisfactory to it; so far as its undertaking is concerned, its obligation is no different from what it

would be, if, instead of receiving valuable rights and privileges, it had been paid by the city a large sum of money.

If the city had made an agreement by virtue of which it paid to the defendant \$100,000, and the defendant, on its part, agreed to pay the cost and expense of constructing this viaduct, whenever called upon so to do, could it be contended, after the viaduct had, in accordance with the terms of such contract, been constructed and paid for, that its construction did not grow out of, or result from the making of such agreement, or from any matter or thing connected therewith?

Could any man, having been paid for building for another a house, thereafter claim that such building neither grew out of, or resulted from, such payment, nor was it a matter or thing connected with such payment? Would not the question be asked of him, 'If the building was not connected with the payment, with what was it connected?'

In the present case it appears that the city in passing this ordinance and thereby granting to the defendant valuable rights and privileges, paid it for constructing this viaduct just as completely as if it had given it a sum of money for such purpose; and having so done, and the defendant having itself constructed the viaduct as the city permitted it to do, it seems to me clear that the agreement and payment are things connected directly with the passage of the ordinance.

By accepting this ordinance the company made an agreement which, whether wise or unwise, burdensome or trivial, it must perform; and therefore leave out of consideration the question as to what its obligations in respect to viaducts hereafter ordered may be.

The proceedings of the common council in respect to this matter have been offered in evidence, and it is argued that they show it was not the intention of the council to impose upon the defendant such an obligation as is sought to be enforced in this case.

It is fair to presume that each party to the contract was endeavoring to make the best bargain it could. The persons representing the defendant doubtless consulted among themselves as to the agreement it should enter into and the language

Steele v. Hill.

to be used in expressing it; but it is manifest that what such persons said among themselves could not, if known, be used to put an interpretation upon the contract made with the city. What are the council proceedings but the talking and planning of the representatives of the city among themselves as to what proposition it would make to the Chicago, Burlington & Quincy Railroad?

I am aware of no case in which council proceedings had, under similar circumstances, been used to interpret the terms of a contract.

Endlich, in his work on the construction of statutes, says that the parliamentary history of an enactment is inadmissible to explain its meaning, and the same opinion is expressed in *Attorney-General v. Sillem*, 2 Exchequer Repts. 52.

At all events it appears to me clear that the history of council proceedings pending the consideration of an ordinance, which is but a proposition, and is of no effect unless accepted by the party to whom it is made, can not be used to give force or meaning to the contract so made. I am, for these reasons, of opinion that the defendant is liable in this action, and the issues are found for the plaintiff."

Judgment affirmed.

WILLIAM K. STEELE

v.

EMILY HILL.

Bailments—Appeal—Nature of Action—Change in—Damages—Evidence.

1. Upon appeal from the judgment of a justice, the nature of the action is determined in the court to which the appeal is taken, by the evidence introduced at the trial, without any reference to what it may have been called in the justice court.

2. If such case is tort, the amount of damages that may be recovered is limited to the amount of a justice's jurisdiction, and whatever the proof, the judgment must not exceed that amount.

35	211
43	379
44	184
35	211
57	314
57	334

3. In an action brought to recover the value of certain articles claimed by the plaintiff to have been stored with defendant, she alleging his refusal to deliver the same to her, this court declines, the evidence being conflicting, to interfere with the verdict in her behalf.

[Opinion filed December 24, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. H. T. STEELE, for appellant.

Messrs. SEARS & ARND, for appellee. •

Per Curiam. This action was brought to recover the value of certain articles which appellee claimed she had stored with appellant, and which she alleges he refused to deliver to her on demand.

An examination of the record discloses that there was a conflict of evidence on the material points in the case, but as the verdict is directly supported by the evidence introduced in behalf of appellee, the conflict must be held to have been settled by the jury in her favor.

The points made by appellant's counsel with reference to the instructions and the admission of evidence have received careful consideration, and we are of opinion that no material error was committed by the court in those respects. There is a slight fault in one of the instructions, but we are satisfied that it resulted in no injury to appellant, and we would not be warranted in setting aside the verdict therefor.

Appellant's complaint that the nature of the action was changed on the appeal, so that what was an action *ex contractu* before the justice, was tried as a tort in the Superior Court, and damages proved, which in amount exceeded the justice's jurisdiction, is without force. The nature of the action is determined in the court to which the appeal is taken, by the evidence introduced at the trial, without any reference to what the action may have been called in the justice court. Of course, if the case is tort, the amount of damages that

Great Western Tel. Co. v. Bush.

may be recovered is limited to no more than the amount of a justice's jurisdiction, and whatever the proof the judgment must not exceed that amount. The recovery in this case is \$200.

We find no error in the record that authorizes a reversal of the judgment, and the same will therefore be affirmed.

Judgment affirmed.

THE GREAT WESTERN TELEGRAPH COMPANY, FOR USE,
ETC.,
V.
WILLIAM H. BUSH.

Telegraph Companies—Stock—Subscription—Installments—Assessment—Evidence—Instructions.

35	213
51	448

1. The payment of an assessment upon corporate stock with knowledge of facts which would warrant a rescission of the subscription thereto, amounts to a waiver thereof.

2. In an action brought to collect an installment upon an alleged subscription to the capital stock of a telegraph company, this court reverses in view of the giving of an erroneous instruction in behalf of the defendant, taking in effect the whole case from the jury and ignoring the question of waiver.

3. It seems that a subscription to capital stock, after the whole has been subscribed for, will not bind the subscriber.

[Opinion filed January 4, 1890.]

IN ERROR to the Circuit Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Mr. THOMAS J. SUTHERLAND, for plaintiff in error.

Mr. M. R. POWERS, for defendant in error.

GARY, P. J. This case presents the same state of material facts as were averred in the declaration of these plaintiffs in error v. Gray, 122 Ill. 630, with the addition of all the documentary evidence referred to in Terwilliger v. these same

plaintiffs in error, 59 Ill. 249. The defense in the Circuit Court was, and here is, based upon the proposition that there can never be but one original subscription for the whole capital stock of a corporation, and that as the defendant subscribed after the whole had been taken, he could not be liable to the company as a subscriber, and it would seem that if he had always stood upon that proposition, he might have successfully maintained it.

The transactions between Reeve, Snow and the corporation, as recited in the Terwilliger case, are, however, quite susceptible of the construction that whatever stock the defendant and others in his position subscribed for, had been surrendered by Reeve to the corporation, and was subject to sale by the corporation to new subscribers. There is no indication in this case, as the Supreme Court say there was not in that, that Reeve had ever taken certificates for any stock, and by that decision the new subscribers were declared to be the *bona fide* stockholders.

Doubtless, when informed of the facts as they appeared in that case, with the emphatic declarations of the Supreme Court on page 259 as to their character, the defendant might have repudiated his subscription and demanded back what he had paid on account of it; but he was put to his election whether he would hold the position that the Supreme Court gave him as a *bona fide* stockholder, or rescind for the fraud practiced. He subscribed in 1868. Within a year he paid six per cent. Twelve years later, under an assessment similar to the one sued for, he availed himself of the privilege allowed by that assessment to pay thirty-four per cent more, by surrendering to the then receiver, indebtedness of the corporation which he bought for that purpose. It would seem probable that by that time he had some knowledge or information of the dealings between Reeve, Snow and the corporation. The lapse of time and the litigation in which the corporation had been engaged were facts from which such information might, perhaps, be inferred by a jury. If, with such knowledge and information, he paid, it was a waiver of objections to his subscription and of his right to repudiate it. Field v. Berlzheimer, 9 Ill. App. 464.

The court gave for him this instruction:

“The jury are instructed, as a matter of law, that when all the capital stock of a corporation is subscribed for and taken at the time the articles of incorporation are duly signed and acknowledged by the incorporators, as required by law, no subsequent subscriber, acting in good faith, by merely writing his name in the corporation books and affixing a number of shares to his name, can acquire a right to any shares of stock, or become by such act a stockholder of the corporation, and liable as such for its debts, but all such subscriptions are absolutely null and void, and of no legal effect.

“If the jury believe from the evidence that the capital stock of the Great Western Telegraph Company was fully subscribed for by persons other than the defendant, and allotted to such persons, on or before the 12th day of May, A. D. 1868, and that such articles of incorporation specified the names of all the stockholders; and that the defendant, Bush, was not one of the stockholders of said company; and that his name is not given or specified in the certificate of incorporation in evidence; and that defendant, Bush, in signing said subscription acted in good faith; and that previous to the time he so signed said subscription all the capital stock of the plaintiff company had been subscribed for, and allotted to others, then they must find for the defendant.”

This instruction in effect took the whole case from the jury, and was in conflict with the result reached by the Supreme Court in the Terwilliger case. The effect of any waiver is ignored by it. It was therefore erroneous.

The rosy hues with which the agent of the corporation, who procured the subscription of the defendant, tinted the future of the corporation, can not be made the basis of a charge of fraud. Whether the case of these plaintiffs v. Gray is to be adhered to is a question for the Supreme Court. The judgment is reversed and the cause remanded.

Reversed and remanded.

Judge GARNETT takes no part in this decision.

THOMAS MACKIN AND JOHN MACKIN

V.

MARGERY BLYTHE.

Landlord and Tenant—Distraint for Rent—Furniture—Chattel Mortgage—Trespass—Punitive Damages—Evidence—Instructions—Special Finding.

1. The presumption is, that furniture in use in a dwelling belongs to the occupant, and a levy thereon for rent by the landlord will not render him liable for exemplary damages unless it appears that he knew that the same belonged to another. Nor would knowledge on the landlord's part that there was a chattel mortgage upon the same deprive him of the right of levying his distress or subject him to liability for punitive damages for so doing.

2. Neither will a landlord be liable for more than the actual damage, where such goods are seized by his agents with knowledge that the same have been taken possession of under a mortgage, by a third person, unless, with full knowledge of all the facts, he ratifies such action.

3. Nor will the retention of the goods by the landlord, after being informed of the claim of such third person, subject him to punitive damages, if in good faith he proposes retaining the same, to test the validity of the mortgage running to such person, and the title to the goods thereunder.

4. Where counsel has obtained the ruling of the court, that proof sought to be introduced is incompetent, and has saved his exception, he need not press the question further in order to preserve the error.

5. In an action brought for the recovery of damages for a trespass growing out of a levy upon certain household furniture for rent due from another, the plaintiff claiming to be in possession thereof under purchase at mortgage sale, this court holds that the evidence does not justify the conclusion that the landlord intentionally and knowingly kept trunks containing her apparel, levied upon at the time the household goods were taken, to wantonly oppress and harass her or to gratify his malice; that the instruction given in her behalf touching the estimation of damages was erroneous; likewise the refusal to allow defendants' counsel to ask the plaintiff upon cross-examination as to her motive in taking the mortgage in question; likewise the ruling that if there was a legal consideration for the mortgage, the intention or motive in taking it cut no figure, and that judgment for the plaintiff can not stand.

[Opinion filed January 22, 1890.]

35	216
44	506
35	216
55	292

Mackin v. Blythe.

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Mr. C. S. BEATTIE, for appellants.

Mr. GEORGE H. KETTELLE, for appellee.

MORAN, J. Appellant, Thomas Mackin, was the landlord of certain premises, which were rented by a written lease from him to one Thomas N. Frances, and were occupied by said Frances and wife, and the appellee, their daughter. On April 21, 1888, there being then some five months' rent, amounting to \$200, due under the lease, said Thomas Mackin issued a distress warrant against the goods and chattels of Thomas N. Frances and Mrs. Thomas N. Frances, and delivered the same to Keegan to execute.

On the morning of April 25, 1888, said Keegan, accompanied by appellant John Mackin, son of Thomas Mackin, and some others, went to the premises and levied upon and carried away the household furniture found in the house, consisting of carpets, beds and bedding, chairs, dressing cases, kitchen range and furniture, and various other articles of household use. The evidence shows that from December 31, 1886, appellee had held a chattel mortgage on said household furniture, executed to her by her father and mother, said Thomas N. Frances and his wife, and that from the time of giving said mortgage up to April 20, 1888, the furniture had been used as the furniture of said rented premises by said Frances and wife, and appellee had lived with them as a boarder. On April 20th the appellee placed a custodian in the house, under her mortgage, and notices were posted of a sale of the property under the mortgage, and the sale was made, or was just in process of being made, at the time Keegan and Mackin and the others entered the house and took the furniture under the distress warrant. Appellee claims to have bought in the property for the amount due on the mortgage. At the time the distress warrant was levied and the property taken, appellee notified Keegan and John Mackin that it was her property, but

they proceeded to take it out of the house, and had it removed to a warehouse and stored. Among other things taken by said Keegan and Mackin were two trunks containing wearing apparel, and which appellee at the time requested them not to take as they contained all her personal apparel, but they, with some show of rudeness, insisted on taking the trunks, offering, however, after they had them on the street, that if she would open them and show them to contain her wearing apparel, she might have them back. That she declined to do. After the goods were taken to the warehouse, a list was made out, showing what had been distrained, and filed in the justice office, together with the distress warrant. The goods were detained, though demanded by appellee, till after the rent for which the distress was levied was paid, which was done May 14th, when they were returned by Keegan to appellee, and receipted for by her. She then brought this action against Keegan and the two Mackins to recover for the trespass and the injury done to the goods, and on the trial, after the suit had been dismissed as to Keegan, the jury rendered a verdict for \$1,000 damages against the two Mackins. The jury found in answer to special interrogatories that the actual damages suffered by appellee were \$85.

The question is, can the verdict, so far as it consisted of punitive exemplary damages, be sustained as against the appellant, Thomas Mackin, under the evidence and instructions set forth in this record. The household furniture taken is shown to have been the furniture which was used in the house rented by Thomas N. Frances, and which he occupied with his family. Such furniture would be presumed to be his (*Hanchett v. Rice*, 22 Ill. App. 442), and liable to distress for rent due from him until the contrary was shown. A levy on said furniture for the rent expressly directed by Mackin would not make him liable for exemplary damages, unless it was shown that he knew that the furniture did not belong to said Frances, but was the property of appellee, nor would the knowledge on Mackin's part that there was a chattel mortgage on the furniture deprive him of the right of levying his distress thereon, or subject him to liability for punitive dam-

Mackin v. Blythe.

ages for so levying. Now, there is no evidence in the case tending to show that Keegan or John Mackin had any other authority from Thomas Mackin than that given in the distress warrant, to wit, to levy for the rent on the goods and chattels of Thomas N. and Mrs. Thomas N. Frances. There is no evidence in the record that Thomas Mackin knew at the time he directed the levy of the distress warrant that appellee had taken possession of the goods under her mortgage; therefore, if Keegan and John Mackin wrongfully seized the goods, knowing that she had taken such possession, or had purchased in the goods under a mortgage sale, Thomas Mackin would be liable only for the actual damages caused by such seizure, unless with full knowledge he ratified the same; nor do we think that his refusal to deliver the household goods up to her after he knew she claimed them as hers under the mortgage sale should subject him to punitive damages, if in good faith he proposed, by retaining the said goods, to test the validity of her mortgage, and of her title to the goods thereunder. It appears from the record that he questioned the *bona fides* of her mortgage (a matter which we shall have occasion to discuss later on), and levying upon the goods was one mode by which that question could be tested, and under the circumstances, about the only mode open to him; and if he was guilty of no bad faith he could, even if mistaken, be held for no more than the actual damages resulting from taking and detaining the goods. *Miller et al. v. Kirby*, 74 Ill. 242.

It is strenuously argued, however, by counsel for appellee, that Keegan and John Mackin were guilty of a wanton and wilful disregard of appellee's rights, and reckless and oppressive conduct toward her in taking her trunks containing her wearing apparel, which were in no way subject to the claim for rent, or to the distress warrant, and detaining them from her for some three weeks, and he suggests, and from an examination of the record we are inclined to agree with him, that it was this which the jury thought was evidence of malice, and upon which they founded the verdict rendered by them. Counsel does not claim, however, that the taking of appellee's

trunks was authorized by the distress warrant, or in any manner directed by Thomas Mackin. It is sought to make him liable on the ground that he adopted and ratified the act. It is said that Thomas Mackin refused to deliver the goods upon demand, but retained all of them as subject to his claim for rent, and thereby reaped the fruits of John Mackin and Keegan's wrongful and malicious act in seizing the trunks of clothing. In order to make Thomas Mackin liable for punitive damages, on this theory, it is indispensable that he shall be shown to have knowledge that the trunks containing appellee's wearing apparel had been taken with the other goods, and that he retained them with such knowledge. We have searched this record in vain for evidence which shows that Thomas Mackin was ever informed by any person that trunks containing appellee's wearing apparel were taken and stored with the other goods. We do not find a syllable of evidence that would put him on notice of the fact. Counsel states that Thomas Mackin instructed Keegan to hold, not only the furniture, but the private trunks of Mrs. Blythe till the rent was paid, but has referred us to no place in the record where such evidence is found. Everywhere in the record where any information is shown to have been given to Thomas Mackin, "the goods," or "the furniture" is what is spoken of, but there is nowhere, so far as we have been able to discover, any mention to him, or by him, of trunks or of wearing apparel.

Indeed, it is rather noticeable that counsel, in seeking to bring home knowledge to Thomas Mackin of what had been done, confines himself to questions about the "goods," and makes no distinct reference to the trunks or the wearing apparel. After asking the witness Keegan, if appellee did not demand the "goods" of him, he asks him if he reported that to Thomas Mackin and on the witness answering that he may have done so, not positive, the next question is: "And afterward, when you took an indemnifying bond, you did tell him everything?" Ans. "Yes, sir."

It is on this last question and answer that reliance is placed as showing that Thomas Mackin ratified the taking of the

trunks and clothing. It is, to say the least, very ambiguous evidence of ratification, and too meager, uncertain and indefinite to support the conclusion that Thomas Mackin intentionally and knowingly kept appellee's apparel from her to gratify his malice, or to wantonly oppress and harass her.

But, however it may be with the question of fact, the verdict can not stand as to this element of vindictive damages, because of the misleading character of the plaintiff's instruction. It will be seen from what has already been said, that Thomas Mackin could have been found guilty under the facts in evidence, and still be liable for actual damages only; that is to say, if by levying on the furniture, knowing of appellee's claim for ownership, or by retaining it with knowledge of such claim after it had been seized, he meant in good faith to test her title to it, then, even if mistaken and found guilty of trespass, he would be liable to appellee for compensatory damages only, and such also would be the limit of the damage, if, in issuing the warrant, he intended only to levy on the goods of Frances, and his agents knowingly levied on the goods of appellee.

The defendant John Mackin, on the other hand, who was clearly shown to have been present at the taking of the goods and to have participated in any acts of an aggravating character which took place, and who directed the taking of appellee's trunks after he was informed that they were no part of the household furniture of Frances, but contained the individual wearing apparel of appellee, would be liable to punitive damages if the jury believed that the manner of the taking or the circumstance of seizing appellee's clothing evidenced malice on his part, or a wanton and reckless disregard of appellee's rights. The two defendants might be found guilty—should in fact be found guilty—if appellee's mortgage was for value and *bona fide*, but Thomas Mackin could not be punished for John's or Keegan's violence of manner or reckless or wanton conduct, unless, with full knowledge of all the facts, he adopted or ratified their acts, and availed himself of the benefit or advantage which such acts gained for him. Such being the conditions, the following instruction was given at appellee's request:

"13. If from the evidence, under the instructions of the court, the jury find the defendants guilty, as charged in the declaration, then, if the jury further find from the evidence that the taking of the property was done under such circumstances, or in such manner, as evidenced a disposition on the part of defendants to maliciously and wantonly possess themselves of such property, regardless of the plaintiff's rights thereto, then the jury are not confined in their estimate of damages to the actual damage shown by the evidence to have been done to the property taken, but they may assess in addition thereto such punitive or exemplary damages, as to the jury shall seem just and proper in view of all the evidence in the case."

This instruction in no way distinguishes between the proof necessary to authorize punitive damages against Thomas Mackin, and that which warrants such damages against John. It contains no hypothesis that Thomas had authorized or approved of the circumstances or conduct shown by the evidence, which would justify the assessment of such damages in the case. The jury might well infer, and no doubt did understand, from the instruction, that the wilful taking of appellee's apparel by John Mackin and Keegan, taken in connection with the fact that it was retained with the other goods seized till the rent was paid, was enough to establish a disposition on the part of both defendants to maliciously and wantonly possess themselves of appellee's property, without regard to the question whether Thomas Mackin knew the clothes had been taken or were being detained. Thus Thomas is made liable for his co-defendants' wrongful conduct, without having authorized it, or knowingly approved of it. The misleading tendency of this instruction is cured by no other instruction given in the case. The jury were nowhere told that they must find that Thomas Mackin knew of the taking and detaining of appellee's trunks, and approved of it, or that he authorized or approved of other conduct of Keegan and John Mackin which showed wantonness or recklessness, and authorized exemplary damages, before they could assess such damages against him. See *Partridge v. Brady*, 7 Ill. App. 639; *Arasmith v. Temple*, 11 Ill. App. 39.

 Edmanson v. Andrews & Co.

We think there was error also in the court's refusing to allow appellant's counsel to ask appellee on cross-examination what her motive was in taking the chattel mortgage from her parents. The subject was one for legitimate cross-examination when the question was asked, as appellee had stated her purchase of the goods under the mortgage sale on the direct.

The court's ruling that if there was a legal consideration for the mortgage, it made no difference what the intention or motive was in taking it, was an erroneous statement of the law, and it is not defended by counsel for appellee. It is argued, however, that there was no error, as the court told counsel when he stated his offer of proof to "ask his question," and counsel did not ask the witness further. We think it plainly apparent from the context that the court in so stating did not intend to rule that questions on that subject were admissible, but to indicate to counsel that he preferred to rule on questions than on offers of proof. Neither does the suggestion that counsel for appellant had other opportunities on the trial for going into the motive of appellee in taking the mortgage, which he did not avail himself of, meet the objection. Counsel having obtained the ruling of the court that such proof as he sought to introduce was incompetent, and having saved his exception, was not bound to press the question further in order to preserve the error. He was at liberty to rest on that exception. *Anglo-American Packing Co. v. Baier*, 20 Ill. App. 376.

The judgment of the Circuit Court will be reversed for the error indicated and the case remanded for a new trial.

Reversed and remanded.

GEORGE EDMANSON
v.
A. H. ANDREWS & Co.

35	223
68	443
35	223
86	62

Practice—Leading Questions—Identity—Prima Facie Evidence of.

1. A general objection is not enough to raise the point that a question is leading.

2. That one at the office of a party to a suit is pointed out as the party himself, is *prima facie* evidence of identity.

[Opinion filed January 22, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. YOUNG & MAKEEL, for appellant.

Messrs. CRATTY Bros. & ASHCRAFT, for appellee.

GARY, P. J. This is one of the numerous class of cases in which the verdict of a jury is final; conflicting evidence, and no error in law.

The first matter complained of in the brief of the appellant, is, that the court asked a witness for the appellees who testified to a conversation with one whom he supposed to be the appellant, in the office of the appellant, "Was he pointed out to you there as being Mr. Edmanson?" To which the witness replied, "Yes, I believe they told me that was Mr. Edmanson."

It might be enough to say that the record shows no exception taken to this matter; and the witness further identified, not absolutely, but to the best of his belief, the appellant in court, as the person with whom he conversed. The question was, however, only objectionable as being leading; the testimony was competent. 2 Ph. Ev. Cow & H. 509, side p.

A couple of leading questions were also objected to generally and exceptions taken. If that testimony had been important, which it was not, a general objection is not enough to raise the point that the questions were leading. Nat. Bk. v. Dunbar, 118 Ill. 625.

There is no error and the judgment is affirmed.

Judgment affirmed.

Buehler v. Galt.

JOHN BUEHLER

V.

JOHN C. GALT AND W. R. GALT.

Negotiable Instrument—Check—Delivery—Mailing—Recovery of—Cancellation—Proposition of Law—Agency.

1. The making of a check and having the same certified by a bank passes no title to the funds on which the check is drawn to the person named as the payee thereof, until delivery.

2. The title to a check, not mailed at the request of the payee or drawee, remains in the sender during its transmission.

3. It being shown that under the postoffice regulations the sender of a letter may, before delivery thereof, regain possession of the same, the presumption will be, in the absence of evidence to the contrary, that such possession in a given case was through lawful means.

4. This court will take judicial notice of postoffice regulations.

5. Delivery of an instrument is not presumed from the fact of its execution. While the maker retains the custody of the instrument, the inference is that it has not been delivered; and unless there is evidence to put a party on notice that it has been delivered, he may legally deal with the instrument, on the assumption that it has never passed from the custody of the maker.

[Opinion filed January 22, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Appellees were co-partners doing business in New York; Doering & LeClair were partners in the galvanized iron business in Chicago, and as such partners became indebted to appellees, for which indebtedness appellees held the firm's acceptance, which was overdue and had gone to protest. In the forepart of April, 1888, Doering & LeClair dissolved partnership, and as a part of the agreement of dissolution a check drawn by Doering on appellant as banker, payable to John Gault & Son, the appellees, for \$417, was placed in the hands of one Walther, who was acting as attorney for both Doering

and LeClair in the matter of the dissolution, for the purpose of having it transmitted to appellees in payment of the indebtedness due them from said firm. Walther presented the check to the appellant's bank, and had the same certified, and afterward inclosed it in a letter, written by him, and placed in an envelope addressed to appellees, and on April 14th deposited the letter in a United States mail box in Chicago, in presence of both Doering and LeClair.

The letter was in the name of Doering, and stated that the check inclosed was to settle the demand of Galt & Son against Doering & LeClair. Shortly after the mailing of the letter one McCamly, the agent of appellees, was in Chicago, and had a telegram from appellees, telling him that the note was protested, and directing him to see the firm about it, and he did see Doering, and was told by him that the check had been sent to appellees. In about ten days McCamly heard from appellees that the check had not been received by them, and then he called on LeClair about it, and upon inquiry the letter was traced to the postoffice as having been mailed to New York, and by return mail to Chicago.

About April 21, 1888, Doering produced the check in question at the bank, and asked that it be canceled, and that he be re-credited with the amount, which was done, the bank taking the check into its possession. The bank had no knowledge as to what had been done with the check after it was certified, and asked Doering no questions when it was presented for cancellation. Doering subsequently drew out the amount of the re-credit which had been given him on the cancellation of the check. On the trial, which was by the court, the jury being waived, there was a finding for the appellees, and judgment thereon.

Messrs. GOLDZIER & RODGERS, for appellant.

The rule is that "a check has no validity until actually delivered to the payee." *Bolles on Banks*, Sec. 60; *Cowing v. Altman*, 71 N. Y. 435; *National Bank v. Strang*, 72 Ill. 559.

What is here called delivery is also comprised in the term of "issuing" a check. And the rules governing checks in

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that respect are laid down as follows: "As promissory notes and deeds require delivery to complete their validity as between the immediate parties to the same, so also does a check require delivery or as it is more commonly called, 'issuing.' It is said that a check is issued when it is in the hands of any person entitled to demand cash for it." Morse on Banks and Banking, Sec. 390; Grant on Bankers, page 16; Ex parte Bignold, 1 Deac. 735.

Thus, where a parcel containing negotiable instruments was left in charge of a servant addressed to the payee with directions to deliver to the postman, it is not a delivery. *Rex v. Lambton*, 5 Price, 428.

So also, if it is placed by the drawer or maker in the hands of his agent for delivery, it is still undelivered as long as it remains in his hands and may be recalled. *Daniel on Neg. Insts.* Sec. 63; *DeVries v. Shumat*, 53 Md. 216.

Messrs. HOYNE, FOLLANSBEE & O'CONNOR, for appellees.

MORAN, J. The making of a check, and having the same certified by a bank, passes no title to the funds on which the check is drawn to the person named as payee of the check. Until the check is delivered, no right accrues by virtue thereof to the payee. Was this check ever delivered to appellees? The placing of the check by Doering in the hands of Walther, to be forwarded to appellees, does not constitute a delivery, because Walther was not the agent of appellees, but of Doering; and there was no time, up to the moment when it was deposited in the mail box, when Doering might not have had it returned to him, on his demand.

In depositing the letter in the box Walther was acting for Doering, for the letter was in Doering's name, and states that the check is sent to pay appellees, because by his agreement with LeClair he is to pay the note. The delivery, then, if there was one, consisted in depositing the check in the mail box, inclosed in the letter addressed to appellees. This did not, in our opinion, constitute a delivery of the check to appellees, under the facts of this case. If this check had been

mailed to appellees by their direction or in response to their request, for the purpose of paying the note which they held, there would no doubt be good ground for saying that the title thereto passed to them when it was mailed, and that the deposit in the mail box would constitute a delivery. But there is in this case no claim that appellees requested or directed the forwarding of this check; or that it was drawn or mailed with their knowledge. The rule stated in *Morse on Banking*, Sec. 305, and which seems to be founded in reason and based on respectable authority, is as follows: "The title is in the sender until the check comes to the hands of the drawee, unless the latter has requested the sender to forward money to him by mailing check; in that case, the title vests in the drawee when the check is placed in the mail, according to his directions. *Talbot v. Bank of Rochester*, 1 Hill, 295; *Graves v. The American Exch. Bank*, 17 N. Y. 207.

Appellees contend the delivery of a note or deed is complete when the maker or grantor has parted with his dominion over it, with intent that it shall pass to the grantee or payee, and they cite the case of *Kirkman & Luke v. The Bank of America*, 2 Caldwell, (Tenn.) 397, where the title to a note which was lost in the mail, was held to vest in the payee from the time it was deposited for transmission. The facts of the case show, however, that the note was deposited in the mail with three other notes, under an agreement that notes indorsed were to be forwarded to the payees, but no particular indorsers were agreed upon, and the only question open was whether the payees would assent to the indorsers. It further appeared that when the payee learned of the loss they procured a duplicate and took steps to collect the note. The case stands on its own peculiar facts.

In this case it is not to be assumed that Doering parted with dominion over the check by depositing it in the street letter box. We are bound to notice judicially the postoffice regulations, as well those which authorize the sender of the letter to stop its transmission at any point before it has reached the hands of the person to whom it is addressed, and get it back into his own hands, upon complying with certain condi-

tions, as the rule which makes the deposit of a letter in a mail box on the street corner a mailing of the same. See Laws and Regulations of Postoffice, Secs. 531 and 533.

It is not shown by the evidence how Doering regained possession of the letter and check, but these rules of the postoffice show a lawful method by which he may have done it, and in the absence of evidence showing the contrary, we are bound to presume that he did regain it in a lawful manner.

The principle already stated, that the title to a check not mailed at the request of the payee or drawee, remains in the sender during transmission, compels the assumption that the postoffice is to be regarded as the agent of the sender, and the effect of these regulations, giving, as they do, the sender power to stop and recall a letter sent, goes far to support that assumption, and to establish that the delivery of a letter into the hands of the postal authorities, is not in all cases to be regarded as a delivery to the one to whom it is addressed.

The effect of a somewhat similar regulation of the French postoffice was held in England to constitute the postoffice the agent of the sender, till the point was reached, after which the sender could not regain the letter from the postal authorities. *Ex parte Cote, In re Deveze*, L. R. 9 Chy. App. 31.

We are then of opinion that in this case the postoffice was the agent of Doering, at all times from the deposit of the letter in the box, till its re-delivery in Chicago, and that at no time was the letter or check in the hands of the agent of appellees. Therefore appellees never had title to the check, and were not entitled to maintain this action. But upon the rule stated in appellant's fifth proposition of law, which the court refused, we think appellant's defense to the action was complete. Said proposition was as follows:

"The court holds, as a matter of law, that the possession of a check by the drawer raises a presumption that it has not been delivered to the payee, and that unless notice of a different state of facts is brought home to the banker upon whom the check is drawn, he has a right to act upon that presumption and cancel the check on the application of the drawer."

Delivery of an instrument is not presumed from the fact of its execution. While the maker retains the custody of the instrument, the inference is that it has not been delivered, and unless there is evidence to put the party on notice that it has been delivered, he may legally deal with the instrument on the assumption that it has never passed from the custody of the maker. What principle is there that takes a certified check in the hands of the drawer out of this general rule?

We know of none, and must say, therefore, that the court below erred in refusing to hold said proposition of law. *Abrams & Co. v. Union National Bank*, 31 La. Ann. 61.

The judgment will be reversed and the case remanded.

Reversed and remanded.

CHARLES W. PARDRIDGE AND EDWIN PARDRIDGE

v.

PATRICK F. RYAN.

Partnership—Accounts—Auditor—Evidence—Agreement of Counsel as to Questions Asked—Oath—Waiver—Report—Exceptions—Chap. 177 R. S.

1. An order that an action of assumpsit be changed to that of account, has no effect while the pleadings remain in assumpsit. Complaint of such action primarily made herein comes too late.

2. A court has no power to direct the parties to a given suit how they shall proceed.

3. There is no law requiring a referee to be sworn.

4. The knowledge of an attorney that an auditor is a master in chancery, and the taking of testimony before him as such, he likewise knowing that the order of appointment as auditor had not reached him, amounts to a waiver of the fact that he was never sworn as such.

5. The appointment of a referee to try a common law controversy stands upon the same reason as the reference to a master of a similar controversy in chancery, and the proceedings, founded upon the same necessity, should be similar.

6. Upon an agreement of counsel in proceedings before a referee touching the taking of accounts, that objections to questions asked should be taken down, but should not be passed upon by him, and that they should

35	230
50	233
35	230
55	404
35	230
77	83
35	230
179a	519

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be reserved in the testimony when it came before the court if either party wanted to raise the questions, an exception will not lie to the referee's report unless it affirmatively shows that a wrong result has been reached.

7. Whatever surplusage such report contains, not so connected in terms with the other matter that it may not be stricken out without changing the meaning of what is left, may be rejected. And so treating such report, the finding upon the main issue between the parties stands, like the verdict of a jury upon conflicting evidence, as a finality.

[Opinion filed January 22, 1890.]

APPEAL from the Superior Court of Cook County; the
Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. BRANDT & HOFFMAN, for appellants.

Messrs. DUNCAN & GILBERT, for appellee.

Where the cause is not strictly referable, a party who consents to a reference is concluded by the order of reference. *Harris v. Bradshaw*, 18 Johns. 26; *Armstrong v. Percy*, 5 Wend. 535.

In *Smith v. Minion*, 1 Cox (N. J.), 16, which was an action of slander that by consent was referred, upon the report coming in the defendant contended that under the declaration there could be no recovery; after disposing of some collateral question the court say: "Again, putting all this out of the question, we are clearly of opinion that it is not competent for a party who submits to a reference, and agrees that judgment shall be entered and execution issue, to come forward at this stage and take exception to the declaration. The defendant's counsel were called upon to show a case where, after an award made upon a reference by consent, the court even looked into the declaration to see if the action was sustainable. The opinion of Lord Chancellor Hardwick, in the case of *Medcalf v. Ives*, 1 Atkyns, 63, seems decidedly the other way. No such precedent has been, or we believe can be found, and this court, under the circumstances of this case, feel no inclination to make one. The consent of parties that judgment shall be entered, is in the nature of a release of errors, and the plaintiff here is acting manifestly contrary

to his agreement of record; the court will not listen to such an allegation." See, also, *Forseth v. Shaw*, 10 Tyng (Mass.), 256.

There seems to be no adjudication in this State as to the effect of failure to take the oath by the auditors where the parties appear and proceed with the hearing without making objection or raising the question; but we have authority on so closely analogous questions as to be fairly considered directly in point.

Section 3, chapter 10, Rev. Stats. Ill., on "Arbitrations and Awards," is as follows:

"Before proceeding to hear any testimony in the cause the arbitrators shall be sworn faithfully to hear, examine and determine the cause according to the principles of equity and justice, and to make a true and just award according to the best of their understanding; which oath may be administered by any officer authorized to administer oaths."

By the wording of this latter clause the requirement of the oath is equally as imperative as in the case at bar, under the quoted Sec. 7 of Chap. 2.

The only instance in which the higher courts of this State have passed upon the point at issue, so far as we have been able to find, is the case of *K. & S. R. R. Co. v. Alfred*, 3 Ill. App. 511, where one of the points made against the award of the arbitrators was that they were not sworn. In that case the Appellate Court, at page 515, used the following language:

"There is a conflict of authority as to whether the statute award is valid if the arbitrators be not sworn, where the statute directs they shall be. In Louisiana and Kentucky it has been held that the award is void if they be not sworn." *Overton v. Alpha*, 13 La. Ann. 558; *Fisher v. Mosley*, 1 Littell, 247; *Lile v. Barnett*, 2 Bibb, 166.

"In New Jersey it has been decided both ways." *Ford v. Potts*, 1 Halst. 393; *Inslee v. Flagg*, 2 Dutcher, 368.

"In New York, Missouri and Wisconsin, and perhaps other States (Massachusetts should be included, and the United States Supreme Court as well), it is held, and, we think, with

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better reason, that the parties may waive the requirement of the statute, and that if they tacitly go on with the hearing before unsworn arbitrators they shall be deemed to have so waived the swearing." Howard v. Sexton, 1 Denio, 440; same case, 4 Const. 157; Browning v. Wheeler, 24 Wend. 258; Tucker v. Allen, 47 Mo. 438; Hill v. Taylor, 15 Wis. 190; see, also, Newcomb v. Wood, Sup. Ct., U. S. Central Law Journal, Vol. 8, p. 175.

"It would certainly be a fraud for one of the parties noticing the omission to keep silent, and if the award should be favorable to still remain silent, but if unfavorable to move to set it aside because of the undisclosed omission; and we are not disposed to consider the neglect a fatal one, even on a motion for judgment under the statute."

This case was reversed in the Appellate Court, and under a certificate of importance went to the Supreme Court, where it appeared as Alfred v. K. & S. W. R. R. Co., 92 Ill. 609; and in the Supreme Court no question whatever was raised upon the score that the arbitrators had not been sworn. See, also, R. R. I. & St. L. R. R. Co. v. McKinley, 64 Ill. 338; Edwards v. Edwards, 31 Ill. 474; Cornelius v. Boncher, 32 Breese.

In the case of Cochran v. Bartle, 8 Western Reporter, 707, decided by the Supreme Court of Missouri, in March, 1887, and in which the Missouri cases cited by appellant's counsel are expressly commented upon, the point made was that the award was void and had no binding force, because the arbitrators were not sworn. That, also, was a case like the case at bar, in which the statute of Missouri required the arbitrators to take an oath. There the court say:

"The defendant, in his answer, resists its enforcement, on the ground that neither the arbitrators nor witnesses were sworn; that the award is not specific enough to be enforced, and did not embrace all matters referred for arbitrament. On a trial had before the court, sitting as a jury, judgment was rendered for the plaintiff, from which the defendant has appealed, and assigns, among other grounds of error, the action of the court in giving and refusing instructions. The

court tried the case upon the theory, as shown by the instructions given, that, if the parties to the arbitration waived the swearing of the arbitrators and witnesses, the award could not be assailed on the ground that they were not sworn. If this theory is correct, and if there is evidence in the case tending to show such waiver, the court did not err in giving the instructions complained of.

That the theory adopted by the trial court was the correct one, is established by the case of *Tucker v. Allen*, 47 Mo. 491, where it is held that notwithstanding the statute requiring arbitrators to be sworn, the parties might waive the taking of the oath, and that the failure of the arbitrators to take the oath in case of such waiver, would not invalidate their award; and the doctrine of the New York courts was approvingly referred to, where it is held that such waiver might either be express or inferred from surrounding circumstances, as where the parties proceed to a hearing without objection." The same principle is announced in the following authorities: *Howard v. Sexton*, 1 Denio, 440; *Newcomb v. Wood*, 97 U. S. 581 (Bk. 24, L. Ed. 1885).

"In the case last cited it is said: 'The objection that the arbitrators were not sworn is waived by the plaintiff in error by appearing and going to trial without requiring an oath to be administered. If the witnesses had not been sworn the waiver of that defect under the same circumstances would have been equally conclusive.'

"Counsel have cited us the cases of *Toler v. Hayden*, 10 Mo. 400; *Bridgeman v. Bridgeman*, 23 Mo. 272; *Walt v. Huse*, 38 Mo. 210; *Fassett v. Fassett*, 41 Mo. 516; *Frissell v. Fickes*, 27 Mo. 557, as being opposed to the case of *Tucker v. Allen*, *supra*. This point, we think, is not well taken, as an examination of the cases shows the question of waiver was not before the court in any of them, nor in any manner referred to; and that they only decide that every submission to arbitration which is in writing, is to be regarded as a submission under the statute which requires that the arbitrators should be sworn.

It is also insisted that the court erred in refusing instruc-

tions asked by defendant, to the effect that, although the court might believe that defendant waived the taking of the oath by the arbitrators, unless the court further believed that, at the time of such waiver, defendant did not know that the statute required the arbitrators to be sworn, in law there was no waiver. It is a well recognized maxim that every one is presumed to know the law, and that ignorance of the law does not excuse. While the defendant testified that he did not know that it was necessary for the arbitrators to be sworn, he does not testify that his action would have been otherwise than it was, had he known it, or that he would have required them to take the oath. In the case of *Grafton Company v. McCully*, 7 Mo. App. 580, it is said that 'the administration of the oath to arbitrators may be waived; and that if this is done, it is immaterial that the parties did not know that the statute prescribed an oath.'

. In *Manard v. Freder*, 7 Cush. 250, the Supreme Court of Massachusetts say: "Parties can not be permitted to lie by, making no objection to the forms and mode of proceeding before the arbitrators, taking their chances for a favorable result, and when they find the award to be adverse, avail themselves of such grounds to get rid of it. In such cases silence is acquiescence, and amounts to a waiver of all objections to irregularities in the proceedings."

The objection that the arbitrators were not sworn was waived by the plaintiff in error by appearing and going to trial without requiring an oath to be administered. If the witnesses had not been sworn the waiver of that defect under the circumstances would have been equally conclusive. *Edwards, Referees*, p. 107; *Morse, Arbitration and Award*. 172. In *Howard v. Sexton*, 1 Denio, 440, *Bronson, Ch. J.*, said:

"It is not denied that there was a statute submission (R. S., 541, Sec. 1), but the argument for the defendant is that because the arbitrators were not sworn (Sec. 4) the whole proceeding before them was *coram non judice*; or at least that it was not a statute arbitration, and consequently there was no authority to swear the witnesses, as there would have been, had the arbitrators been sworn. Such is not my opinion.

True, the statute says the arbitrators shall be sworn; but that, like similar provisions in relation to judges and jurors, was only intended to secure to the parties, if either of them desired it, a hearing and decision by persons sworn to a faithful discharge of their duties. I can not suppose that the Legislature intended to prohibit the parties from waiving the oath to the arbitrators, *nor that going on by consent without the oath changes the legal character of the tribunal.*"

In *Day v. Hammond*, 57 N. Y. 479, the submission was on condition that six days' notice of time and place of meeting should be given to hear and determine the claims in dispute.

The facts show that no notice was given of either time or place, and complaining party did not appear or consent.

The New York Rev. Stats. required the oath as ours does. The court say: "The first subject of inquiry is whether Slayter's failure to take the statutory oath invalidates the award so completely as to make it a nullity, or whether it is an irregularity which leaves the award in force until set aside by the court, or whether it is of no legal consequence.

"On this point there is a great conflict in the decisions of the respective States. In New Jersey, where an oath of office is required by law of arbitrators, an award made without taking the oath is a nullity. *Combs v. Little*, 3 Green Ch. 310; *Inslee v. Flagg*, 2 Dutch. 368. The same rule prevails in Kentucky (*Lile v. Barnett*, 2 Bibb. 166); so in Louisiana (*Overton v. Alpha*, 13 La. Ann. 558; *Bethea v. Hood*, 9 Id. 88), and in Missouri (*Frissel v. Ficks*, 27 Mo. 557; *Toler v. Hayden*, 18 Id. 399; *Fassett v. Smith*, 41 Id. 516). On the other hand it has been held in Vermont, in Wisconsin and in Pennsylvania, that the oath of the arbitrators may be waived, and that its absence is not a vital or jurisdictional question. *Woodro v. O'Connor*, 28 Vt. 776; *Hill v. Taylor*, 15 Wis. 190; *Otis v. Northrup*, 2 Miles, 350. This result has also been reached in the New York cases. *Browning v. Wheeler*, 24 Wend. 258; *Windship v. Jewett*, 1 Barb. Ch. 173; *Howard v. Sexton*, 1 Denio, 440; S. C., 4 N. Y. 157. The defendant insists that the question did not come up directly in the last case. The principle, however, is involved. The oath can not be waived

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if it is jurisdictional. In *Islee v. Flagg*, the case of *Howard v. Sexton* is commented upon, and the decision is made to rest upon the ground that the New York courts hold that the agreement of the parties gives the arbitrator jurisdiction, and that the absence of the oath is not vital. In following *Howard v. Sexton*, this court must hold that the failure of *Slayter* to take an oath as arbitrator was, at the most, an irregularity and could be waived. There was, however, in the present case, no waiver. The irregularity continued down to the issuing of the award.

"The true view is that the court, acting as a court of equity, should, where there is no waiver, set aside the award on proper application. The statute should be regarded as having some practical operation. While it is reasonable to hold, as in *Howard v. Sexton*, that the parties may, by mutual consent, waive the statutory provision, yet in a case like the present where there is no evidence whatever of waiver, the correct construction of the statute is that a party may insist upon the observance of its requirements; and the court may, in the exercise of a sound discretion, set aside the award for want of such observance."

It will be observed that in this last case there was no notice given of either the time or place of the hearing before the arbitrators, and the complaining party neither appeared nor consented to the proceeding and consequently there would be no waiver. But the reasoning of the court showed that if these elements of waiver existed, the award would not be impeached because of the failure of the arbitrator to take the prescribed oath.

In *Browning v. Wheeler*, 24 Wend. 257, the court say:

"This is not a jurisdictional fact. At least until the contrary appear it must be intended they were sworn, or that the parties waived the ceremony by not objecting, or by positive consent. Jurisdiction means legal power to make the judicial decision. That, in the case of arbitration, is conferred by delegation from the parties."

In the case at bar the power to the auditors proceeds from the appointment by the court.

The conclusion to be deduced from the foregoing review of the authorities is, that since, in case of ordinary arbitration the jurisdictional power to go on and hear and determine the matters in controversy is derived from the consent of the contending parties, and that the like power in cases such as the case at bar is derived from the appointment by the court, therefore, in neither case does such jurisdictional power depend upon or proceed from the taking of the oath. The taking of the oath is but a part of the prescribed ceremony or mode of procedure, which, like any other ceremonial feature of court procedure can be dispensed with, either by the express agreement of the parties, or by their acquiescence and failure to object.

In this case no step was had or taken before the auditor at which appellants were not present and in which they were not active participants.

GARY, P. J. This case was before this court at the March term, 1884, and is reported in 14 Ill. App. 598, where the nature of the controversy is shown. At the October term, 1888, of the Superior Court, the proceedings shown by the following order were had:

"Thereupon the court of its own motion enters the following order: This cause having come on to be heard, a jury having been called and impaneled, counsel for both plaintiff and defendants having made their opening statements to the jury, and it appearing to the court from the statements of counsel made in opening their case that the issues herein involved the settling of accounts between plaintiff and defendants which are in the nature of partnership accounts and involve book accounts and the examination of many vouchers and papers and the casting of accounts, it is ordered by the court, of its own motion, that the jury be and the same is discharged, and that the form of action is changed to that of account, and the defendants, by their attorney, in open court making no objection to this proceeding, and stating that they are willing to account to the plaintiff, and ask that the plaintiff should also account to them, it is ordered that the defendants do

account with the plaintiff, and further ordered that the plaintiff do account with the defendants, and further ordered that George M. Stevens be, and he is hereby appointed auditor in this case, under the law, who shall proceed with all due speed to appoint a time of hearing and proceed with the hearing of this case, according to law, and take an account between the parties, plaintiff and defendants, and take the evidence and report the same to this court, together with his conclusions thereon, finding in particular:

“First. What were the net profits of the business carried on under the name of the New York store at 284 and 286 West Madison street, from about February 1, 1875, to about November 1, 1880?

“Second. What interest, if any, the plaintiff has in said net profits?

“Third. When did the plaintiff's interest in the net profit begin and when did it end?

“Fourth. What amount, if any, the defendants are now owing the plaintiff on account of such net profits?

“Fifth. What amount, if any, the plaintiff is owing the defendants on account of said business; to all of which the plaintiff, by his counsel, enters his exceptions herein.”

Irregular and unwarrantable as this action of the court was, the appellants, by their conduct, encouraged, and can not now complain of it. The order “that the form of action is changed to that of account” had no effect upon it while the pleadings remained in *assumpsit*. Calling a thing that which it is not, does not change its nature, and in another application of the same principle, shortly to be mentioned, such incorrect nomenclature does not prevent a thing from becoming that which in its nature it is.

The only obstacle, besides such incorrect use of words, that is in the way of that order of the court being a proper order under Chap. 117, R. S., as to referees, is the absence of the agreement of the appellee to it; but the appellants can not raise that objection; therefore the action of the court, and the subsequent conduct of the cause by the parties, may be treated as governed by that chapter, even though the court and par-

ties did not have it in mind. This view of the case does not approve the order. A court has no power to direct the parties how they shall proceed. It may permit or prevent such a conduct of the cause as the parties may wish to pursue, and visit upon them appropriate consequences resulting from a difference of opinion as to the proper methods, but whether a party will or will not prosecute or defend, and the mode in which, if at all, he will do so, he is to determine. But this case, by the consent of the appellants, did get before Stevens, called an auditor; in fact, a referee. Treating the case as a reference under Chap. 117, to be which it only lacked the agreement of the appellee, and the appellants being estopped upon that point, the first two objections of the appellants, based upon the form of proceedings, and the lack of pleadings in an action of account, have no application.

The third objection, that the auditor (referee) was never sworn as such, was waived by the conduct of the appellants. Their counsel knew he was a master in chancery, and began to take testimony before him as such, when he knew that the order of appointment as auditor had not reached him, and when, therefore, he must presumably have known that he had taken no new oath, and continued the proceedings before him to the end without inquiry or objection on that score: *K. & S. W. R. R. v. Alfred*, 3 Ill. App. 511; and besides, there is neither statute nor constitution requiring that a referee shall be sworn.

May 10, 1889, the auditor (referee) filed his report, and May 14, 1889, the appellants filed fifteen exceptions thereto, and upon the conclusion of the argument upon them, filed also nineteen propositions of law for the court to pass upon.

May 25, 1889, the court announced its decision overruling the exceptions and confirming the report, and the case stood over to May 28, 1889, to give time for counsel to prepare the judgment form. On that day the counsel for appellants came in with a motion for the court to hear the evidence read, to pass upon and decide the various objections to it, and quash or approve the report. This motion the court refused to entertain or permit to be filed, on the ground that the case had been heard and decided.

Perhaps the appellants had the right to file the motion and have it sustained or denied, but if it had been denied on the same ground upon which it was rejected, the result would have been the same, and the appellants are not injured by the method adopted.

On the hearing of the exceptions the appellants called Stevens as a witness, and this is a part of his testimony:

"What is your name?"

"George M. Stevens.

"Are you the gentleman to whom this case was referred as referee?"

"I am.

"Were you ever sworn as referee in the case?"

"I believe not.

"Between the counsel what was the understanding upon which the evidence was received there with respect to the objections that were made to evidence that went in?"

"It was agreed between the attorneys on both sides, I believe, that the objections should be made to any questions asked, taken down by the reporter, but that the referee would not pass upon the questions. They should be reserved in the testimony when it came before the court, if either party wanted to raise the question."

And as to this agreement the appellants' brief says "there is no dispute about this fact." This extract from the examination of Stevens is significant as showing that the distinction between an auditor in an action of account, and a referee under Chap. 117, had been lost sight of, and that the counsel for the appellants had, perhaps without reflection, felt himself to be in the position of counsel for a party to a cause which had been properly referred; had adapted himself to that position, and adopted such a course of proceedings as in his judgment was for the interest of his clients. There is little room to doubt that any mode of trial of the pending issue, other than that before the jury which had been just sworn, was welcome to him at the time the reference was made.

Now, with such an agreement as is recited in that testi-

mony, it is trifling with judicial procedure to hold that any exception would lie to the report, unless the report itself shows affirmatively that a wrong result has been reached. The parties have no right to heap upon the court the labor to avoid which is the purpose of the reference.

All attorneys here are also solicitors in chancery, and familiar with the practice of courts of equity, where no exception to the report of a master will be heard by the court, unless the same matter has been made the ground of objection before the master, and his review of it asked. *Hurd v. Goodrich*, 59 Ill. 450; *Prince v. Cutler*, 69 Ill. 267.

The appointment of a referee to try a common law controversy stands upon the same reason as the reference to a master of a similar controversy in chancery, and the proceedings, founded upon the same necessity, should be similar.

The loudest complaint here is that Stevens received the incompetent testimony of one Levy, as to what was generally understood in the New York store as to the interest of the appellee; enlogizes him by name, and immediately follows with the statement, that "After examining all the evidence taken, and the books of the defendants, I think, from all the evidence and the circumstances as shown by these books, that the plaintiff is correct in his claims," etc.

It is not possible to know that if Levy had not testified the result would not have been the same. Indeed, from the brief for the appellants, it is a plausible conjecture that their counsel thinks it would, if nobody had testified. The other evidence in the case is such that, as this court held when the case was here before, the question of partnership and the specific terms of the contract between the parties was for the jury to pass upon. The fact that Stevens goes out of his way to repeat in his report the testimony of Levy, and speaks in his praise, does raise the suspicion that he attached weight to that testimony, but it is, after all, only an inference, and not an inevitable one, that he did. The parties have no right to frame rules for the conduct of business so loose as to impose upon the court labor that does not belong to it to perform, and then ask relief from the consequences, at least unless it appears with certainty that injustice has been done.

Pardridge v. Ryan.

The agreement that the referee should not pass upon objections made, was of necessity an agreement that he should receive what was offered. He was prevented by the act of the appellants from rejecting the testimony of Levy. The reception of that testimony is therefore not by itself alone a ground of exception to the report. No just complaint can be made that the referee made his report "after examining all the evidence taken," for that evidence ought to be the basis of his report.

It comes, then, to this: Shall his report be set aside because he reports the incompetent testimony and praises the witness, without any statement of what, in his judgment, was proved by that testimony, or what effect it had upon the result reached?

If parties on a trial before a jury should agree that all objections to evidence should be overruled by the judge, and reserved for use upon a motion for a new trial by the losing party, no court would consent to be so trifled with. In principle it is the same thing as is condemned in *St. L., A. & T. H. R. R. Co. v. Thomas*, 85 Ill. 464, and *Smith v. Kimball*, 128 Ill. 583. One Graham was a witness on the former trial, but had since left the State. What he then testified was competent, and properly admitted now. 1 Gr. Ev., Sec. 163; 1 Tay. Ev., 429.

Exceptions to the report of the referee, that he received incompetent testimony, objections to which the parties agreed he should not pass upon, will not lie. Whatever surplusage his report contains, not so connected in terms with the other matter that it may not be stricken out without changing the meaning of what is left, may be rejected. And so treating his report, his finding upon the main issue between the parties stands, like the verdict of a jury upon conflicting evidence, as a finality.

As to some minor matters, it is clear from the evidence reported that the result is wrong. The appellants were entitled to a credit for taxes and insurance beyond what they received to the amount of \$542.49. All the exceptions relating to other matters were properly overruled. The offer of propositions of law for the court to act upon was irregular, and it makes no difference what that action was.

The judgment is, for the failure to credit appellants enough for taxes and insurance, reversed and the cause remanded, unless the appellee shall, within twenty days after the filing of this opinion, remit \$542.49 of the judgment, in which case the judgment will be affirmed for the residue, \$8,725.99.

In either event the appellants recover their costs here.

Reversed and remanded upon certain conditions.

GARNETT, J. To sustain the practice adopted by the Superior Court on the last trial of this case, is a task attended with some difficulty, but as it was forced upon the appellee against his protest and was approved by appellants, the opinion of the majority of the court does no injustice to appellants in denying them relief from errors they invited. But that consideration does not apply to the incompetent evidence of Levy.

Appellee's action was brought to recover a share of the profits of appellants' dry goods store, from February, 1875, to October 11, 1880. Appellants claimed that the agreement to share the profits with appellee was made about September 1, 1878. A large part of the profits were alleged to have accrued between February, 1875, and September 1, 1878.

On the hearing before Stevens, the witness Levy, introduced for the plaintiff, testified that he was employed in the store from April or May, 1875, to September or October, 1878. He was interrogated by plaintiff's attorney, as follows:

"Did you learn of or hear during the time you were there, anything said upon the subject of Mr. Ryan having any interest in the profits of Pardridge's store?"

The question was objected to by defendants' attorney on the ground of incompetency and irrelevancy. The auditor did not then rule upon the admissibility of the evidence, stipulation having been made between the parties that the objections made to evidence should be noted and not passed upon by the auditor, but reserved for the determination of the court. The witness answered, "It was so generally understood; we always supposed that was the case." One of the appellants' exceptions to the auditor's report was devoted to an

Pardridge v. Ryan.

attack on the admission of the evidence, but the exception was overruled by the court, on the ground that the evidence, though incompetent, was immaterial, and did not appear to have influenced the auditor. In this the court was clearly mistaken, as the auditor in his report takes the pains to reproduce, *verbatim*, the question and answer referred to, and then refers to the evidence of the witness in terms of special commendation. This, however, would not be the cause for reversal, if the record presented such a preponderance of evidence in favor of plaintiff on that point, as to make it clear that a new trial must terminate in the same judgment. No such condition of things can be found in the record.

There is difficulty in estimating whether the weight of the evidence fixes February, 1875, or September, 1878, as the time when the agreement to share the profits was made. A verdict for either party on this evidence, by a jury correctly instructed, could not be disturbed on the ground that it was contrary to the evidence.

Levy entered the store as an employe in April or May, 1875, and left there in September or October, 1878; and as he "always supposed" that Ryan had an interest in the profits, his supposition must naturally be referred to the entire period of his employment, and so had a strong tendency in the mind of the auditor, or referee, to make the date of the agreement at least as early as April or May, 1875.

The evidence, being purely hearsay and incompetent, should not have been made the foundation for the finding of a material fact. Whatever departure from approved practice may have been encouraged by appellants, they were entitled to a trial on the competent evidence only, which the record affirmatively shows has not been accorded to them. For this reason I dissent from the conclusion of the majority of the court on this point.

35	246
46	562
35	246
55	309
138	284
35	246
59	539
35	246
60	577
35	246
66	321

JOHN ALLING ET AL.
V.
WILLIAM T. WENZELL ET AL.

Corporations—Dissolution—Personal Liability of Stockholders—Subscription for Stock—Revocation—Reversal.

1. No device will free a holder of corporate stock purchased from the corporation for a percentage of its nominal value from his obligation to creditors to pay the residue.

2. A subscription for corporate stock upon which nothing was paid is revocable by consent of the parties concerned, before the corporations begins to do any business, and before any interests of third persons to be affected by such revocation attach, and the persons so surrendering are not assignors to the persons who afterward buy the stock from the corporation, and therefore not jointly liable with them under Sec. 9, Chap. 92, R. S.

3. The reversal of a judgment or decree reverses the whole of it, except where the interests of the several parties against whom it was rendered are wholly severed and independent, in which case the reversal operates only as to the parties who procured the same.

4. In proceedings involving the winding up of a corporation, this court holds that the dissolution can not be complained of, in view of the fact that it had ceased business and its assets were exhausted; that proceedings in cases of this character must be ambulatory until complete satisfaction or total insolvency has left nothing to be reached; and declines, in view of the evidence, to interfere with decrees to this end.

[Opinion filed January 22, 1890.]

APPEAL from the Superior Court of Cook County; the
HON. HENRY M. SHEPARD, Judge, presiding.

MESSRS. HUTCHINSON & LUFF, and MESSRS. BISBEE, AHRENS
& DECKER, for appellants.

MR. WALTER M. HOWLAND, appellees.

GARY, P. J. This is a second appeal by the same persons who were appellants in the case of the same title, reported in 27 Ill. App. 511.

There is also a separate appeal by Ransom W. Dunham, but both appeals are docketed here as one case. The errors

for which the case was before reversed are not in the present record.

The persons who were appellants before, now complain that although they bought of the corporation for a percentage of the par or nominal value, full paid stock, they are now charged, contrary to the terms of their bargain with the corporation, with the residue or unpaid portion of that par or nominal value. Whether the corporation could call upon them under Sec. 7, Chap. 32, R. S., is not the question here.

It probably never entered into the contemplation of the Legislature, that stock in a corporation was to be issued by it for any other consideration than money equal to par of the stock paid, or liable to be called for, as provided in that section; but under Sec. 8, as to creditors, no device will free a holder of stock from his obligation to pay to the uttermost farthing.

The scheme of having the stock first subscribed for by one set of men, then surrendering it to the corporation, and the corporation selling it out as full paid on the receipt of ten or twenty per cent of the par, is no more effectual than the abortive one which the opinion on the former appeal recited from *Melvin v. Lamar Ins. Co.*, 80 Ill. 446.

Another error assigned, that those first subscribers, who paid nothing, are not charged jointly with the appellants, is based upon the assumption that a subscription, once made, with nothing done under it, is irrevocable, even by consent of both parties, and before the corporation begins to do any business, and before any interests of the third persons to be affected by such revocation attach. There is nothing intrinsically wrong in such a transaction. *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220. And the persons so surrendering are not assignors to the persons who afterward buy the stock from the corporation, and, therefore, not jointly liable with such purchasers under Sec. 8.

That the court decreed a dissolution of the corporation works these appellants no conceivable injury. Its assets are exhausted and it has ceased business. If there is anything theoretically erroneous in that part of the decree, the corporation has probably not life enough left to make an audible

complaint. But the decree in that respect is justified by *St. Louis v. Sandoval*, 116 Ill. 170.

The error special to Dunham, which he assigns, is that, as he never appealed from the first decree, that remains in force as to him, notwithstanding the reversal on the appeal by others, and therefore this decree against him should not have been made. Considering that the first decree required him to pay nearly three times as much as this does, it requires a little reflection to discover his interest in seeking to abide by it. But the general rule is that the reversal of a judgment or decree reverses the whole of it. The exception is that where the interests of the several parties against whom it was rendered are wholly dis severed and independent, the reversal operates only as to the parties who procured the reversal.

That former decree found, as this finds, the whole amount to be raised and the part each was to contribute. A reversal and finding of a new amount to be raised, or changing the sum or sums to be paid by one or more of the parties liable, destroys the equilibrium, and unsettles the ratio upon which the first decree rested as to all parties. *Enos v. Capps*, 12 Ill. 255; *Rees v. Chicago*, 38 Ill. 322; *P., F. W. & C. R. R. Co. v. Rene*, 123 Ill. 273.

"Where there are several dependent judgments, and the principal of one is reversed, the other can not be supported." 2 *Saund.* 101*aa*; *McJilton v. Love*, 13 Ill. 486.

In the nature of things, the proceedings in cases of this character must be ambulatory until complete satisfaction or total insolvency has left nothing to be desired or hoped for.

There is no error, and the decrees are affirmed.

Decrees affirmed.

35	248
56	212
35	248
06	636

35	248
f93	4104

T. BENTON LEITER AND J. Q. GRANT

v.

WILLIAM E. DAY.

Landlord and Tenant—Trespass—Lease—Conditions—Breach by Tenant—Ejectment of—Evidence—Instructions—Damages—Pleading.

Leiter v. Day.

1. Bad instructions for the winning party are not cured by good ones for the loser.
2. A defendant proving one of several pleas in bar is entitled to a judgment.
3. A person employing another to take possession of certain premises is liable for actual damages to the person dispossessed.
4. A ratification of a trespass is not a ground for vindictive damages.

[Opinion filed January 22, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Messrs. STILES & LEWIS, THOMPSON & SWISHER and C. S. CUTTING, for appellants.

Messrs. MEECH & ASAY, for appellee.

GARY, P. J. This is an action of trespass against appellants, for putting the appellee out of possession of premises demised to him by Levi Z. Leiter. The appellants justified under the lease by which the rooms were demised, "to be used for dental offices," and which contained a covenant that no part of the premises should "be used for any other purpose," with stringent provisions for terminating the tenancy, and re-entry for any breach of covenant, averring that the appellee used the rooms for sleeping and bedrooms, cooking and dining rooms, in connection with dental offices, and for that cause they, as agents of the lessor, put the appellee out.

The appellee replied *de injuria*. Upon the evidence there could not be so much question that the plea was proved. The appellee was married. From his own testimony it appeared that he and his wife slept in the rooms, that they cooked and ate there, not wholly, but to a considerable extent, and had no other residence.

But in the instructions to the jury, and in the argument here on behalf of appellee, the case is treated as though the issue the jury were sworn to try had nothing to do with it.

The instructions on behalf of appellants, however emphatic, do not avoid the errors in giving those for the appellee. Bad

instructions for the winning party are not cured by good ones for the loser. Cases cited in *Counselman v. Collins*, 35 Ill. App. 68. Among the instructions were these:

1. "The court instructs the jury that if they find from the evidence that the plaintiff was in the actual and peaceable possession of the premises in question in this suit on and before December 2, 1887, then, as a matter of law, the plaintiff's possession is presumed to be rightful until the contrary is shown; and no one, not even the owner of the said property himself, had a right to go upon said premises and forcibly eject plaintiff therefrom, or remove his property, if from the evidence the jury believe any property was so removed against the plaintiff's will, unless the plaintiff had authorized such entry and removal." (Given.)

6. "If the jury find from the evidence that defendant J. Q. Grant, at the time of the alleged trespass by direction of defendant T. Benton Leiter, either with or without force, entered into the rooms occupied by the plaintiff, and did then and there against the will of said plaintiff forcibly remove said plaintiff's property from said rooms, and did forcibly dispossess said plaintiff from said rooms, and did take possession of said rooms against the will of said plaintiff, either by force, threat or fraud, then and in that case the jury should find the defendants guilty; and if the jury further believe from the evidence that the plaintiff was by such acts damaged in person or property, or in business, then the jury, in assessing damages to be awarded to plaintiff, may not only take into consideration such damages as they believe from the evidence he actually sustained, but may also, if they further believe the acts of said Grant and those assisting him were wanton, forcible, insulting, and in reckless disregard of the plaintiff's rights, add to said actual damages so proven, if any, such sum as they think proper as exemplary damages." (Given.)

These instructions were almost equivalent to directing the jury to find for the appellee; for though there was some testimony that the appellee yielded voluntarily to a demand for possession, yet, as between landlord and tenant, only a sanguine attorney would expect the jury to so find.

Magloughlin v. Clark.

It is true that by another plea than the one under consideration, the appellants had alleged such voluntary surrender, but if they failed to prove that, and proved their justification under the plea, the substance of which has been stated, they were entitled to a verdict. "If a defendant plead, and proves one plea in bar, he is entitled to judgment. McClure v. Williams, 65 Ill. 390-393.

The appellant Leiter was not present at the eviction, but had employed the appellant Grant to take possession of the premises. By so doing, if the eviction was wrongful, he made himself liable for all actual damages to the appellee. But if he acted in good faith, without malice, with reasonable prudence, in the exercise of what he believed to be a legal right, this would be the extent of his liability. It is probable that a liberal estimate by the jury of the actual damages in such a case would not be disturbed, but the damages must be ostensibly actual. Hawkes v. Ridgway, 33 Ill. 473; T., P. & W. R.R. v. Patterson, 63 Ill. 304; Miller v. Kirby, 74 Ill. 242.

A ratification of a trespass is not a ground for vindictive damages. Grund v. Van Vleck, 69 Ill. 478; Rosenkrans v. Barker, 115 Ill. 331. The sixth instruction, as well as others upon ratification not quoted, runs counter to the doctrine of these cases.

On the general subject of punitive damages, see also Pierce v. Millay, 44 Ill. 189; Becker v. Dupree, 75 Ill. 167; Gravett v. Mugge, 89 Ill. 218; Cutler v. Smith, 57 Ill. 252; Kurrus v. Seibert, 11 Ill. App. 319.

It is not credible that the actual damages of the appellee approximated the amount awarded by the jury. The judgment is reversed and the cause remanded.

Reversed and remanded.

JOHN MAGLOUGHLIN ET AL.

v.

ALBERT B. CLARK.

*Trust Deeds—Foreclosure—Attorney's Fee—Interest Notes—Purchase
of by Holder of Junior Incumbrance—Evidence—Mortgages.*

1. This court holds that the evidence introduced in the case presented warranted the allowance of the sum provided for in a trust deed as attorney's fee in case of foreclosure.

2. Where a debt is secured by a mortgage, the assignment of part of the debt carries the benefit and control of the security, upon such terms as the relations between the assignee and the holder of the residue of the debt may require.

3. The purchase by the trustee in, or by the holder of the indebtedness, of a prior incumbrance, of any part of the indebtedness of a junior incumbrance, must, as between the two, be held to be so much in the nature of a partial redemption, as to leave to the holder of the residue priority of right to the satisfaction of that residue, before applying any proceeds of the property to the satisfaction of that part of the debt so sold.

4. This court will not go outside the record in a given case, and refer to its record or memory of former litigation to the prejudice of parties to such case.

[Opinion filed January 22, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. LOBIN C. COLLINS, Judge, presiding.

Messrs. WILSON & ZOOK, for appellants.

Mr. C. C. MARCH, for appellee.

GARY, P. J. This is a bill filed to foreclose a deed of trust in the nature of a mortgage. Two questions arise upon this record.

The first is as to the sufficiency of the evidence to warrant the allowance of \$100 as an attorney's fee provided for in the deed in case of foreclosure.

That evidence was as follows, the witness being an attorney:

"Do you know what reasonable solicitor's fees are in foreclosure suits of this kind?"

"I know what is customary and what is reasonable."

"What is the usual customary fee?"

"The usual customary fee—it is usually provided for in the trust deed. There is usually allowed not less than \$100."

The only question by the appellant was:

"Are you the attorney of record in this case?"

Magloughlin v. Clark.

And the answer was, "I am not."

It is apparent that the appellants' counsel did not deem the amount unreasonable, and impliedly assented to it. Even without such implication the testimony is enough to warrant the fee of but little over five per cent of the amount involved in a litigated foreclosure suit.

The other question arises in this way:

The appellee is the assignee of the principal and later interest notes secured by the trust deed in this case. Some eighteen months before he became such assignee, he then being the holder of the indebtedness secured by a junior trust deed, made by the same appellant upon the same premises, either he, or the trustee in that junior incumbrance, bought from the then holder of the subject of the present suit some overdue interest notes remaining unpaid, and some certificates of redemption of the premises by that holder from tax sales. It is not denied that in the hands of that holder those interest notes and certificates were secured upon the premises by the deed in suit; but it is contended that by such purchase they were taken out of the operation of that deed, and the security lost.

It is familiar law in this State that the debt is the principal, and the mortgage the incident, where a debt is secured by mortgage; that the assignment of part of the debt carries the benefit and control of the security upon such terms as the relations between the assignee and the holder of the residue of the debt may require. *Humphreys v. Morton*, 100 Ill. 592, and cases there cited by counsel as well as court.

Now, the purchase by the trustee in, or by the holder of the indebtedness of a prior incumbrance, of any part of the indebtedness of a junior incumbrance, must, as between the two incumbrances, be held to be so much in the nature of a partial redemption, as to leave to the holder of the residue, priority of right to the satisfaction of that residue, before applying any proceeds of the property to the satisfaction of that part of the debt so sold. There is nothing in the nature of the transaction or the relative equities of the parties requiring any further modification of the general rule.

By the express provisions of this deed of trust the money paid to redeem from tax sales with interest at eight per cent became "so much additional indebtedness secured by the deed."

In equity any indebtedness is assignable. Bispham's Eq., Sec. 164. The little uncertainty, of which the appellants have endeavored to make much, as to what the appellee may have represented as to whether he or the trustee paid for the part of the debt bought, is too unimportant for consideration. Perhaps it may be disputed whether any part of that debt was bought; whether the transaction was not rather a payment of so much of the debt. If that is the right view the result is the same. A junior incumbrancer paying a prior one is subrogated to the rights of the latter. 2 Jones on Mort., Sec. 1080.

The appellants seem to assume that the court, on this appeal, will go outside of the record of this case, and refer to its record or memory of former litigation to the prejudice of the appellee. This appeal is to be decided by this record by the evidence admitted, and by considering whether evidence rejected would, if admitted, have changed the aspect of the material facts.

There is no error in the record, and the decree is affirmed.

Decree affirmed.

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47 579

EUGENE C. BATES ET AL.

V.

THE GREAT WESTERN TELEGRAPH COMPANY ET AL.

Practice—Interlocutory Decree—Bill to Set Aside—Multiplicity of Suits.

An original bill will not lie to review an interlocutory decree.

[Opinion filed January 22, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Messrs. GEORGE L. PADDOCK and WILLIAM C. NIBLACK, for appellants.

Mr. THOMAS J. SUTHERLAND, for appellees.

GARY, P. J. This is a bill filed by the appellants to set aside, or declare inapplicable as to them, an interlocutory decree of the Circuit Court, made in another suit, pending on the chancery side of that court, whereby a receiver of the assets of the appellees was authorized to collect from the stockholders of that corporation, part of their unpaid subscription for stock.

The Circuit Court sustained a demurrer to their bill, and dismissed it for want of equity. Whether the appellants or any of them (they are thirty-four in number) are in the category of persons to be affected by the interlocutory decree, is an open question for them when the receiver sues them.

Whether the Circuit Court ought to have made such an interlocutory decree or not, can not be made the subject of an original bill. The stockholders, though not parties by name to the former suit, are yet in such a relation to it, that if the interlocutory decree was improvidently made, they might, by petition in the cause, apply to the court to modify or vacate it. *Ward v. Farwell*, 97 Ill. 593, 618; *Upton v. Hansboro*, 3 Bissell, 417, 426; *Sanger v. Upton*, 91 U. S. 56, 59; *High on Receivers*, Sec. 262. But an original bill, which is in the nature of a review, lies only after a final decree. *Story's Eq. Pl.*, Secs. 408, 421. It would be a singular state of things that a decree, not appealable, should be revised, and the effect of an appeal obtained by an independent suit. The bill is not sustainable on the ground that a multiplicity of suits is to be prevented. There is no joint or common interest in the complainants.

Stockholder or not stockholder, with subscription partly unpaid or not, is an individual question with each complainant, as much as if the receiver held the several promissory notes of the complainants. The bill was rightly dismissed, and the decree is affirmed.

Decree affirmed.

Judge GARNETT takes no part in this decision.

ABRAHAM KAUFMAN ET AL.

V.

OTTO SCHNEIDER, ASSIGNEE.

Insolvency—Judgments by Confession—Motion to Set Aside—Assignment—Preference—Res Adjudicata—Appeal—Motions—Notes—Escrow—Deliveries.

1. Equity will not interfere in behalf of the maker of a judgment note, founded upon a sufficient consideration, where judgment is taken thereon, without jurisdiction of such maker.

2. A ruling upon a motion, which is final, is appealable, and the same may be interposed as an estoppel, no appeal having been taken, when the matters decided are again sought to be made the subject of controversy.

3. This court holds, in proceedings touching the assignment of an insolvent firm, a judgment by confession having been entered upon certain judgment notes previously given by it on the day a voluntary assignment was made by such firm, though at an earlier hour, that the decree of the County Court setting forth, among other things, that such judgment and the execution thereon amounted to an unlawful preference, can not stand, and directs that said execution creditors be allowed priority of payment out of the goods levied upon.

[Opinion filed January 22, 1890.]

APPEAL from the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

Messrs. QUIGG & BENTLEY, for appellants.

From the recent cases decided by the Supreme Court of our State, we extract the following rule: If the preferential act of the debtor is done at a time when he has his mind made up to assign, or at a time when he "is busied solely with a consideration of the disposition to be made of his assets in view of the impending and inevitable catastrophe," then the preference is void. The quotation above is from the opinion of the court in the case of Hide and Leather National Bank v. Rehm, 126 Ill. R. p. 461. In that case it appeared that the notes which were held to constitute the preference

Kaufman et al. v. Schneider.

were given in the afternoon of one day, and the assignment was recorded at twenty-five minutes past nine in the morning of the next day. The insolvent pretended that he did not make up his mind to assign until the morning of the day the assignment was made, but the court decided that it would not, where the two acts were so nearly simultaneous, attempt to discriminate the exact point of time when the debtor resolved to assign; that it was sufficient that he was busied solely with a consideration of the disposition to be made of his assets in view of the impending and inevitable catastrophe.

Messrs. PAGE, ELIEL & ROSENTHAL, and KRAUS, MAYER & STEIN, for appellees.

The power of a partner to bind his firm by a confession of judgment has been denied in the following cases: Girard v. Basse, 1 Dall. 119; Sloo v. State Bank of Ill., 1 Scam. 428; Barlow v. Reno, 1 Blackf. 252; Grafebrook v. McCreddie, 9 Wend. 437; Crane v. French, 1 Wend. 311; 1 Am. Leading Cases, 452; York's Appeal, 36 Pa. St. 458; Bitzer v. Shunk, 1 Watts & S. 340; Shed v. Bank, 32 Vt. 709; Christy v. Shennan, 10 Ia. 535; Edwards v. Pitzer, 12 Ia. 607; North v. Mudge, 13 Ia. 496; Remington v. Cummings, 5 Wis. 138; Everson v. Gehrmann, 1 Abb. Pr. 167; St. John v. Holmes, 20 Wend. 609; Lambert v. Converse, 22 How. Pr. 265; Clark v. Barven, 22 How. 270; and we believe the rule there laid down to be good law.

Whether the signing partner disappears or not, his copartners may sell the entire stock of the firm to pay its debts in good faith; and they may either divide the proceeds of the sale *pro rata* among all their creditors, or they may exclude the payee in the note from any share in the distribution of them. Schneider v. Sanson, 62 Texas, 201; Graser v. Shellwagen, 25 N. Y. 315; Williams v. Barnett, 10 Kan. 455; Halstead v. Shepard, 23 Ala. 558; Cayton v. Hardy, 27 Mo. 536; Arnold v. Brown, 24 Pick. 89; Lamb v. Durant, 12 Mass. 54.

Or they may in good faith convey all of the firm's property to one creditor in satisfaction of their indebtedness to him, thus securing to him a preference over the holder of the note.

Or, again, they may at once file a bill for the dissolution of the partnership and the appointment of a receiver, and procure the delivery of all of the firm's assets to an officer of court.

Appellants assert that "a judgment confessed in favor of a firm creditor by one partner, without the knowledge of the other, even if not sustainable as against the individual estate of the other, ought to be upheld as a lien on partnership assets;" and in support of their position they quote the greater portion of the opinion of the Supreme Court of Pennsylvania in the case of *Grier & Co. v. Hood*, 25 Pa. St. R. 430. We shall take the liberty of printing that portion of this opinion which they have omitted. The "etc.," are as follows: "Thus, in *Morse v. Bellas*, 7 New Hampshire, 549, it was held that one partner could, by deed, bar his copartner of a joint right, and that he might individually adjust, receive payment of, or release any partnership debts; and in *Wills v. Evans*, 20 Wend. 251, an authority under seal, given by one partner to a third person to discharge a firm debt, was held to be good. So, in *Topley v. Butterfield*, 1 Met. 515, the rule was held not to apply where one partner conveyed, by deed, property of a firm which he might have conveyed without deed; and in *Russit v. Strong*, 5 Hill, 163, an assignment, under seal, of a chose in action belonging to a firm by one member, was held to be good. These exceptions and many others of the same general character, which might be adduced, prove that the rule was not intended to prevent the use by an individual member of the firm property for partnership purposes, but to prohibit partnership effects from being misapplied, and also to protect the persons and separate estates of the partners from being bound by acts not contemplated by the articles of copartnership."

Even if we were to admit that the design of making a formal assignment did not suggest itself to the mind of Sues until the afternoon of November 27th (as appellants would have us believe), "all that was done" will "be viewed as parts of the same transaction, so as to make it immaterial whether the determination to make the assignment, in fact, preceded or

followed the execution of the judgment notes." *Hide & Leather Nat'l Bank v. Rehm*, 126 Ill. 461.

A consideration of the case of *Hanford Oil Co. v. First National Bank*, 126 Ill. 584, will lead to the same conclusion. It is there held that "when the debtor enters upon a course of conduct, having for its object the disposition of all his estate for the benefit of creditors, and as a part of the plan by which to effect that object, executes a general assignment, the distribution must be to his creditors in proportion to the amounts of their respective claims."

Admitting that the assignment in the case at bar was not determined upon until the last moment, and that at one time during the formative period of the insolvent's resolutions a conditional bill of sale was the plan of disposition favored, and at another time the execution of judgment notes, the fact remains that the thing actually done was the filing of an assignment deed, and therefore the insolvent estate must be distributed without priority or preference. The notes were certainly not given until the debtors had entered upon a course of conduct having the disposition of all their estate in view.

Appellants have attempted to show that the case at bar comes within the decision of the Supreme Court in *Field v. Goehegan*, 125 Ill. 68. The petition in that case did not charge any contemplated assignment at the time of the execution of the notes, but alleges that the deed of assignment was withheld by the insolvents pursuant to a certain understanding between them and the judgment creditors, etc., etc. It was held that, "Had the warrants of attorney under which the defendant in error obtained priority been executed after the debtors contemplated an assignment, and on the eve of an assignment, then they might be regarded as part of the assignment, and obnoxious to the law." In the case of *Hide & Leather National Bank v. Rehm*, *supra*, the Supreme Court has announced a broader doctrine; but for the determination of the *Field* case the more restricted rule was quite sufficient. The evidence there shows that the liens in dispute had been obtained through the diligence of the holders of the judgment

notes, and it was not claimed that the notes were executed after the insolvents had entered upon the disposition of their estate with a view to an inevitable failure. The matter in controversy was entirely different from that disputed in the case at bar, and hardly touches it at any point. We claim that the circumstances of the case before us were of such a nature that it makes no difference at what precise point of time, between the 14th and 27th of November, insolvents determined to assign, and that any reasoning based upon the fundamental fact that the intention of assigning was actually formed after the execution of the judgment notes, is not appropriate to this case; and we contend, further, that the advantage which Kaufman Bros. & Co. gained was not due to the diligence of Lachenbruch, but to the act of Furthmann, the attorney for Sues & Uhlendorf, who, knowing his clients' resolution to assign, placed the notes in the hands of Lachenbruch, and admonished him to make haste and get another lawyer.

GARNETT, J. In October, 1888, Sues & Uhlendorf were indebted to Kaufman Bros. & Co., appellants, in the sum of \$12,000 or \$15,000. The creditors became uneasy about their claim, and for some months before that time had been urging Sues & Uhlendorf to give them security. In response thereto promissory notes were made with warrants of attorney to confess judgments thereon. The notes and warrants were executed about October 15th by Sues alone, but with the approval and consent of Uhlendorf; were payable four months after date to Kaufman Bros. & Co., and were left in the possession of Edmund Furthmann, to be by him held subject to the order of the makers. Kaufman Bros. & Co. being dissatisfied with the situation, one of the firm, Lachenbruch, visited Chicago about November 15, 1888, when, upon application to Sues for better security, the notes first executed were surrendered to Sues, and he then executed in the firm name of Sues & Uhlendorf, new notes with warrants of attorney to confess judgments. The new notes were payable on demand to the order of Kaufman Bros. & Co., and for the

same amounts as the notes executed in October. On November 27th judgment by confession in the Superior Court was entered on the notes last executed in favor of the payees and against the makers; execution was immediately issued on the judgment and levied on the stock of goods belonging to Sues & Uhlendorf. Afterward, and on the same day, they made a voluntary assignment for the benefit of their creditors; which was then duly filed and recorded. On November 28th the County Court ordered the sheriff to deliver to the assignee of the insolvents the property levied upon, reserving to the court the right to determine the validity of the execution lien upon the same and the proceeds thereof. On the same day Uhlendorf made a motion in the Superior Court to set aside the judgment on the grounds, first, that the note was not signed by him. Second, that the note was not signed by his authority. Third, that the warrant of attorney was, as to him, wholly unauthorized. Fourth, that the judgment was without his consent or authority; but the motion was overruled. On petition of one Hier, a creditor of the insolvents, the court, on March 11, 1889, entered a decree finding that Sues had no authority from Uhlendorf to execute the judgment notes; that the same were left in escrow in possession of Furthmann, until he should be directed by Sues & Uhlendorf to deliver them to appellants; that Furthmann, without any authority to do so, delivered them to appellants on November 27, 1888, after Sues & Uhlendorf had determined to execute a voluntary assignment for the benefit of their creditors, and after appellants were informed of such determination; that such judgment and execution were an unlawful preference, and it was ordered that they be treated as void so far as they were sought to be made the basis of such preferences. Appellants now pray for the reversal of that decree.

The effect of the judgment as to Uhlendorf must first be ascertained. If the judgment is void as to him, the ruling of the County Court may be conceded to be unassailable. There is no denial of the fact that the notes were founded on a sufficient consideration. The insolvents legally and equitably owed the money to appellants. The law in this State seems

to be, in such cases, that if a judgment is taken on the claim in favor of the creditors, without jurisdiction of the debtor, equity will not interfere in favor of the latter. The court so decided in *Colson v. Leitch*, 110 Ill. 504; and in *Martin v. Judd*, 60 Ill. 78, it was held, that where an attorney had appeared, without authority from the defendant, and a judgment was entered, by means of which redemption was effected from a sale of real estate under a prior execution, the purchaser under such prior execution was not in a position to challenge the authority of the attorney who entered the defendant's appearance in the second suit.

There is, however, still another reason why the judgment is conclusive as to *Uhlendorf*. The points now raised against the judgment are *res adjudicata*. They are identical with the points of this motion to set aside the judgment in the Superior Court. The court then had jurisdiction of the parties and the subject-matter. The ruling on the motion was final and an appeal might have been taken therefrom. That the adjudication is upon a motion instead of the original merits of the case makes no difference in this respect, when the very matters decided are again sought to be made the subject of controversy. If the decision on a motion is final, affects a substantial right, "and may be reviewed or corrected on appeal, and the complaining party acquiesces, we see no reason why the decision should not be as conclusive of the matters decided, as the determination of the action itself would be of the whole controversy." *Sanderson v. Daily*, 83 N. C. 67.

The same question has been considered in various cases with the same result, substantially, as in the North Carolina case. See *Dwight v. St. John*, 25 N. Y. 203; *Fruenkenthal's Appeal*, 100 Pa. St. 290; *Austin v. Walker*, 61 Iowa, 158; *Commissioners v. McIntosh*, 30 Kas. 234; *Langdon v. Raiford*, 20 Ala. 532; *Grier v. Jones*, 54 Ga. 154; *Herman on Estoppel*, Sec. 472.

We must, then, consider the judgment final and not open to attack, unless it was an unlawful preference.

Here again the conclusive character of the judgment is material. Rightful delivery of the notes to appellants is one

of the facts which the judgment determined. But it does not fix the date of the delivery. It appears very clearly from the evidence that when the new notes were given, Lachenbruch was insisting upon more satisfactory security than his firm then possessed, and it was certainly the intention of all parties to satisfy him on that point. If the notes were delivered to Furthmann in escrow, to be held by him until directed by Sues & Uhlendorf to hand them to appellants, we are at a loss to perceive how their security was improved by the new arrangement. They were still in the power of their debtors, and really without any security. The only witness whose evidence gives any support to appellee's contention on this branch of the case is Sues. The evidence of Katz is of no moment, as he makes no pretense to knowledge of anything on the subject, except what Sues told him. The force of Sues' evidence given on this hearing is much impaired by the fact that immediately after the assignment he was called upon to testify, and stated on oath that he did not remember that the second notes were given in escrow, but that he gave them to Furthmann to do what he thought best with them. Katz testified that he was present when the new notes were made, and Sues then said nothing about holding the notes in escrow. Furthmann testified that the notes were made without any condition whatever; that the old notes were delivered up to Sues, and at the same time he showed the new notes to Lachenbruch, who examined and returned them to Furthmann, and said, "I want you to hold these notes for me." Furthmann did keep the notes for appellants until November 27th, when he handed them to Lachenbruch. As to these facts Furthmann is corroborated by Lachenbruch. Moreover, there is no evidence that Furthmann was authorized after November 15th to make a delivery of the notes; all the evidence given shows that if there was any delivery, it must have taken place on November 15th, and as we have seen, the judgment is conclusive that there was a delivery at some time.

The security required by appellants was the result of their own vigilance and the pressure they exerted against their debtors. It was not voluntarily offered to them by the

debtors as incident to a determination to dispose of all their property for the benefit of their creditors. It is very doubtful whether either of the insolvents ever determined to make an assignment or other disposition of all their property for the benefit of their creditors prior to November 27th. From Sues' own evidence it appears that he did not intend to make an assignment when he executed the notes on November 15th. The most unfavorable statement he makes on the subject as to appellants, is that he may have been thinking of an assignment for three days before it was actually made. The business of the insolvents was continued as usual after November 15th, and until November 27th, and on the very day the assignment was made Sues tried to borrow from appellants for his firm, \$700 additional, to aid them in carrying on their business. The refusal of that request was probably the proximate cause of the assignment, but the facts are far from pointing to any determination of the debtors, as early as November 15, 1888, to yield the dominion of their property for the benefit of their creditors. We think the case of *Field v. Geohegan*, 125 Ill. 68, answers the charge of unlawful preference now made against appellants' right to a lien under their execution.

The decree is reversed and the cause remanded with directions to the County Court to enter an order allowing the execution of *Kaufman Bros. & Co.*, priority out of the proceeds of the goods levied on.

Reversed and remanded with directions.

35	264
97	*569

BERNARD GRAFF

v.

HARRIS SMOLENSKY.

Certiorari—Laches—Promise to Dismiss Suit—Consideration.

1. A plaintiff in a given suit promising to dismiss the same, upon the receipt of a valuable consideration therefor, is bound thereby.

2. No question of *laches* is involved upon the issuance of a writ of *certiorari* at any time during the period prescribed by the statute.

[Opinion filed January 22, 1890.]

APPEAL from the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

Messrs. MOSES, NEWMAN & PAM, for appellant.

The judgment at bar was rendered October 6, 1885, and the six months expired on April 5, 1886. This was the last day of the six months. The statute can not be construed to mean that a party injured by a wrongful judgment may wait fully six months before suing out the writ; such party must exercise due diligence, and in analogy to the right of appeal, which expires in twenty days, a reasonable time should not extend beyond the period of twenty days. Thus when petitioner discovered in January, 1886, that he was injured by an unjust judgment, it was his duty within twenty days to procure a writ of *certiorari*, and having waited until April 5, 1886, he was guilty of such *laches* as to bar the remedy. If this were not so, a petitioner in *certiorari* would stand on more favorable grounds than the ordinary defendant, who must appeal in twenty days.

In Tennessee no statutory limitation exists, as in Illinois, in reference to the writ of *certiorari*, but a rule of diligence has been established by the Supreme Court of Tennessee compelling parties to go to the next term of court for a *certiorari*. It will be found that if parties are guilty of negligence in this regard the writ is quashable. Thus, in *McMurray v. Milan*, 2 Swan, 177, a party had been sued in many cases, making in the aggregate an amount *that would ruin him*. A judgment had been rendered on the 18th day of February 1852, for \$201, upon which execution had been issued. On the 9th of April, 1852, he filed a petition for *certiorari*. The court says: "This is certainly a strong case of merit, and relief ought to be extended if it can be done without a violation of the settled rules of law; and in a case of so much hardship and such strong merits we would be inclined to strain those rules, if it were not for the mischievous effect of such a precedent and the importance of adhering to settled principles. * * *

It was decided in this State, as early as 1808, in *Henderson v. Lockey*, 2 Tenn. 110, that there were but two grounds for dismissing this writ. First, not showing satisfactorily why the ordinary remedy by appeal was not resorted to. Second, for want of merits on the face of the petition." The court discusses the insufficiency of the petition, and concludes by saying, that "Sound and necessary policy so well established requires every man to attend to his suits at a designated time, and that there should be an end to litigation, and forbids that a judgment should be disturbed and the rights of parties unsettled under such circumstances as surround this case."

In *Johnson v. De Berry*, 10 Humphrey, 440, the judgment before the justice was rendered on the 7th of August, 1849. *Certiorari* was applied for on the 18th of October, 1849. The court took judicial notice that a term of court was held on the fourth Monday in August, and that no reason was shown in the petition for not removing the proceeding to the first term of the Circuit Court. It was held that this delay was fatal, and as *certiorari* is only a substitute for an appeal, it will be granted and allowed only where reasonable and proper diligence is used to procure it (citing authorities).

To the same effect are *Lanier v. Sullivan*, 1 Head, 440; *Newman v. Rogers*, 9 Humphrey, 121.

An attempt was shown in the last cited case to excuse the neglect, but the court said that "To sustain the application would be to contravene the uniform current of decisions on this subject, and encourage gross negligence and promote interminable litigation." See, also, *Porter v. Wheaton*, 5 Yerger, 108.

In North Carolina a *certiorari* might be sued out at any time within five years, in analogy to the statute, allowing five years for writs of error. Yet, in *Bowman v. Foster*, 32 N. C. 48, a writ was dismissed because the delay was continued for two and one-half years after the judgment was rendered, constituting such *laches* as precluded him from his remedy. See, also, *Anstin v. Bush*, 11 Col. 198; 17 Pac. Rep. 501.

The petition was deficient in substance according to all the authorities in the Supreme Court and in this court. The peti-

Graff v. Smolensky.

tioner, Smolensky, was guilty of gross negligence in relying upon the plaintiff for information as to the judgment. It was his duty to inspect the docket and see that the case was dismissed.

It appears from the transcript that there had been several continuances in the case, and it had been continued from September 26, 1885, to October 3d; from thence by agreement to October 5th, at nine o'clock in the morning. The case was then continued to October 6, 1885, and judgment was taken.

The general doctrine as to negligence is, that there must be freedom from negligence, and that a judgment was not suffered through negligence. The jurisdiction of the court is statutory, and it must appear from the record, and where inconsistent reasons are assigned in the petition, those most unfavorable to the petitioner must be adopted as the ground assigned. *O'Hara v. O'Brien*, 4 Ill. App. 154.

In the case just cited the petition alleged that the petitioner had once paid the money into court according to the law, and that by the false and fraudulent representations of the plaintiff in that action, the petitioner has been led to believe that said judgment would not be enforced against him until it was too late to take an appeal in the ordinary way. The Appellate Court of the Fourth District reversed the judgment, with instructions to quash the writ of *certiorari* because inconsistent and contradictory allegations had been made in the petition which could not be reconciled. The last allegation was taken to be true—that the appellee knew of the judgment and did not take an appeal because of the false and fraudulent representations of the plaintiff without stating what those representations were.

The petition at bar is inconsistent in alleging the payment of \$25 and producing a receipt in full for \$1. The allegation of the sending of the dozen of live geese is deficient because he fails to state how he sent them, and that Graff received them; *non constat*, but he may have sent them and Graff did not receive them. The petitioner impleads *Bernard* Graff and produces a receipt of *Barnett* Graff. In fact, the petition lacks precision and clearness of statement.

See, also, *Cushman v. Rice*, 1 Scam. 565; *White v. Frye*, 2 Gilm. 65; *Lord v. Burke*, 4 Gilm. 363; *Murray v. Murphy*, 16 Ill. 275; *Russel v. Pickering*, 17 Ill. 31; *Clifford v. Waldrop*, 23 Ill. 336; *Davis v. Randall*, 26 Ill. 243; *First National Bank v. Beresford*, 78 Ill. 391; *President, etc., of Town of Waverly v. Kemper*, 88 Ill. 579.

Mr. A. W. BRICKWOOD, for appellee.

The writ of *certiorari* being a statutory one, it is only necessary for us to inquire if the requirements of the statute relating to the form and contents of the petition have been complied with, and if so, was it filed in time?

Section 76, Chap. 79, p. 1461, of the Rev. Stat. of Ills., *Starr & Curtis*, governs the contents of the petition, and we respectfully submit that a careful reading of the petition in this case will disclose the fact that the requirements of the statute which requires that the petition shall set forth and show "that the judgment before the justice of the peace was not the result of negligence in the party praying such writ—that the judgment, in his opinion, is unjust and erroneous, setting forth wherein such injustice and error consists, and that it was not in the power of the party to take an appeal in the ordinary way, setting forth the particular circumstances which prevented him from so doing," have been literally complied with.

In fact, the petition as a whole not only complies with the statute in every detail, showing the original judgment as erroneous and unjust, entered without negligence on the part of the petitioner, in disclosing a meritorious defense, and that an appeal could not have been taken in the ordinary way, but it is in harmony with all the decisions of Supreme and Appellate Courts of this State. *Gallimore v. Dazey*, 12 Ill. 143; *Stout v. Slattery*, 12 Ill. 163; *Howe v. Harris*, 44 Ill. 34; *Davis v. Randall*, 26 Ill. 243; *McNerney v. Newberry*, 37 Ill. 91; *Stocking v. Knight*, 19 Ill. App. 501.

A most searching examination of every decision in our State will convince any one, that in this case the writ was properly allowed, and the cases cited by appellant's counsel only add strength to those cited herein.

In the case of *Stocking v. Knight*, *supra*, the court, in holding that an agreement by an attorney was not sufficient, says: "There is no pretense that appellee made any contract or said anything to influence the action of appellant." In the case at bar, it was the plaintiff who made the promise and lulled the defendant into security before the judgment was entered. And in this last regard, it differs from many of the cases cited, where the judgment had already been entered, and the record made. There was no indebtedness upon which a judgment could be entered.

In the case of *Neal v. Handley*, 116 Ill. 418, the court sustains a rule long since established, holding that a part payment of an indebtedness, where there was a sufficient consideration to support the promise to receive it in full satisfaction of the debt, was good, and cites approvingly an English authority to the effect that a part payment accompanied with the gift of a robe or a hawk, would be a sufficient consideration to support the promise to accept a part payment in full satisfaction of an indebtedness.

GARNETT, J. A judgment having been rendered for appellant and against appellee, a resident of Mercer County, Illinois, before a justice of the peace of Cook County, on October 6, 1885, the appellee, on April 5, 1886, filed in the County Court of Cook County his petition for writ of *certiorari* which was granted, and the cause coming on for trial, appellant submitted a motion to quash the writ. The motion was overruled, and appellant excepted to the ruling. The case was submitted to the court without a jury, and, after hearing the evidence, the trial judge found the issues for appellee and rendered the judgment for costs against appellant. A reversal of the judgment is asked because appellee is said to have been guilty of *laches*, relying upon appellant's promise to dismiss the suit before the justice, and in delaying his application for a writ of *certiorari*. The petition for the writ stated that on October 4, 1885, two days before the judgment was rendered by the justice, appellant and appellee met together and compromised the matter in dispute, appellee agreeing to pay

appellant \$27, and, after returning home, to send him a dozen live geese; that on October 5, 1885, he did pay appellant the \$27, and appellant then agreed to dismiss the suit; that appellee asked if it would be necessary for him to go, and appellant replied that it was not necessary, that he would dismiss the suit without judgment or costs to appellee; that appellee relied on appellant's promise, and did not afterward inspect or examine the docket of the justice, and did not know that the suit was not dismissed or that a judgment was entered until January, 1886; and that on his return home in the month of October, 1885, he had sent to appellee the dozen live geese, as he had agreed, and that he was not, when the action was commenced, nor when the judgment was rendered, indebted to appellant, and that the judgment is unjust and erroneous.

The petition contains all the allegations required by Sec. 76, Chap. 79, R. S. Appellee had the right to rely upon appellant's promise to dismiss the suit. The promise was upon a valuable consideration, and appellant was bound thereby. His plea now that he was not worthy of belief, and that appellee was foolish to confide in him, does not conform to the judicial idea of good faith. It is an entirely different case where a judgment is known to the defendant to have been rendered, and he is persuaded not to appeal by the promise of the plaintiff's attorney that the judgment will be compromised, as in *Stocking v. Knight*, 19 Ill. App. 501. An attorney has no authority to make an agreement of that character, and, moreover, it may be doubted whether such an agreement, made when defendant knew of the judgment, could be regarded as taking from the defendant the power to appeal in the ordinary way.

The statute gives six months for issuing a writ of *certiorari*. It is not a question of diligence or *laches* within the time given by the act. The complaining party may file his petition on the last day of the six months, or he may avail himself of the right as soon as he discovers the wrongful judgment, provided only it is within the period named. No reason appears why any different construction should be given the

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section in question than has been uniformly given to the act providing that writs of error shall not be brought after the expiration of five years from the rendition of the decree or judgment complained of.

The expression of the court in *Gallimore v. Dazey*, 12 Ill. 142, accords with the common understanding of the profession on this point, and, until otherwise informed by higher authority, we shall adhere to that interpretation.

The judgment is affirmed.

Judgment affirmed.

T. B. BAKER AND SOPHRONIA BAKER

v.

EDWARD T. SINGER, ASSIGNEE.

Insolvency—Orders Relating to Property of Insolvent—Judge of Another Court—Presiding of.

1. It is the duty of the County Court in insolvent cases to pursue such course with reference to the property which comes to its hands as will best preserve its value and render it most available to creditors. In the efforts to realize the largest returns possible for the creditors, the court must be left in possession of a liberal discretion, and its orders will not be disturbed, unless its discretion is manifestly abused.

2. In cases of this sort where the facts which induced the court to make the orders complained of, are not preserved in the record, the presumption arises that circumstances existed which warranted the same.

3. In the case presented, this court holds, that parol evidence introduced to show that the judge in question was not requested by the county judge of Cook County to hold the court and that a certain order was not entered while presiding as judge, can not properly be considered in view of the fact that the record shows that he was properly presiding therein.

[Opinion filed January 22, 1890.]

APPEAL from the County Court of Cook County; the Hon. E. H. GARY, Judge, presiding.

Mr. GEORGE W. PLUMMER, for appellants.

Messrs. HANEY & MERRICK, for appellee.

35	271
43	631
35	271
149	84
35	271
70	525
35	271
75	631

GARNETT, J. Appellants complain of orders of the County Court of Cook County, in the matter of the voluntary assignment of T. Brougham Baker and Sophronia Baker, insolvents. The orders are said to have been improperly made by E. H. Gary, judge of the County Court of Du Page County. A bill of exceptions in the case present parol evidence taken after entry of the orders, and for the purpose of setting them aside, which, as appellants claim, shows that Judge Gary was not requested by the judge of the County Court of Cook County to hold the court, and that one of the orders was entered by Judge Gary at his private office in Chicago, and not while he was presiding as judge of the County Court. The record, however, recites that he was presiding at the request, and in the absence of, the judge of the court, and that recital can not be attacked in the manner now proposed. *Hansen v. Schlesinger*, 125 Ill. 230; *Weigley v. Matsen*, Ib. 64.

The orders which appellants object to, gave leave to the assignee to finish the building known as Baker's Theater (which was part of the estate assigned), to issue certificates or notes for the money necessarily expended for that purpose, which should constitute, together with other assignee's notes or certificates previously issued, a first and valid lien on the theater property, and to lease the property together or in parts for a term not to exceed five years. Part of the building in question is designed for a theater and its appurtenances, and the remainder for a hotel. The assignee reported on February 19, 1889, that he had leased the theater and its appurtenances to John H. Havlin for a term of five years commencing May 1, 1889, for a rental of \$50,000 for the term, payable in installments, which was the highest bid he received therefor, and he recommended the approval of the lease. The court accordingly approved the same. As the facts which induced the court to give leave to the assignee to finish the building, issue notes and make the lease, are not preserved in the record we must presume the existence of circumstances that warranted the order, and that the same were duly presented to the court. For aught that appears, the appellants may have con-

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sented to the order, and in that case they certainly would take nothing by an appeal. But this court has held in *Singer v. Leavitt*, 33 Ill. App. 495, that it is the duty of the court, in insolvent cases, to pursue such course, with reference to the property which comes to its hands, as will best preserve its value and render it most available to creditors. In the effort to realize the largest returns possible for the creditors, the court must be left in possession of a liberal discretion, and its orders will not be disturbed unless its discretion is manifestly abused. There is no showing of such abuse in this record.

The orders of the County Court are affirmed.

Judgment affirmed.

CITY OF CHICAGO

v.

SARAH A. T. McLEAN.

Municipal Corporations—Negligence—Defective Sidewalk—Personal Injuries—Evidence—Instructions—Damages—Mental Suffering.

1. In an action brought to recover damages from a municipality for personal injuries alleged to have been occasioned by a defective sidewalk, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff.

2. The mental sufferings of the person injured should be considered in assessing damages in such cases.

[Opinion filed January 22, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Messrs. GEORGE F. SUGG, CHARLES S. CAMERON and W. E. HUGHES, for appellant.

Messrs. FREDERICK PEAKE and JAMES FRAKE, for appellee.

MORAN, J. This is an appeal from a judgment recovered against the city by appellee for injuries received by her by reason of a fall at a point where the sidewalk was defective. The ground strongly pressed upon this court as a reason for reversing the case, is an alleged variance between the declaration and the proof with reference to the defect which caused the injury. Where such a point is made, it is material that the court can readily see from the printed abstract just what the allegations of the declaration are, and counsel should be careful to print in the abstracts or briefs, an accurate statement of what the declaration contains. To omit from the abstract, either by carelessness or design, sentences or allegations having a bearing upon the decision of the point made, is very likely to impose unnecessary labor on both court and counsel. In this case, by what we suppose was the inadvertent omission in the abstract of a part of the allegation in the declaration, a basis is furnished for the contention in the brief that there was a material variance, while, had the abstract been a correct one, no argument of the kind could, with any show of plausibility, have been urged.

It is also urged that the verdict is not warranted by the evidence. Appellee swears that she fell and injured herself at the point where the defect in the sidewalk is shown by other witnesses to have existed, and there is no evidence whatever to contradict her statement. The nature and extent of her injuries were testified to by three physicians who were called as witnesses for appellee, while one who was called by appellant failed to find symptoms which indicated that she had received any appreciable hurt. On that state of evidence it can not be said that the verdict is unsupported. Complaint is made that the court instructed the jury that in estimating appellee's damages they should take into consideration her suffering in body and *mind*, if any, resulting from the injury. The Supreme Court has repeatedly held that mental suffering consequent on such an injury is a proper element to be considered in assessing damages. *H. & St. J. R. R. Co. v. Martin*, 111 Ill. 219.

The court gave fifteen of the twenty-one instructions

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requested by the appellant and refused six. An examination of those instructions discloses that the jury were very fully instructed on every material question which arose in the case, and we are of the opinion that no error was committed in refusing appellant's instructions which were not given. The verdict appears to be reasonable in amount; there is nothing about it to indicate partiality or prejudice on the part of the jury, and it being fully warranted by the evidence and no error of law having intervened, the judgment rendered thereon must be affirmed. *Judgment affirmed.*

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V.
THE PEOPLE EX REL.

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Bastardy—Evidence—Verdict—Practice.

1. In bastardy proceedings this court declines to interfere with the verdict that defendant was the father of the child in question.

2. In cases of this character no transcript of any proceedings before the justice need be filed; only the warrant for the arrest and the bond for the appearance are required; neither need the complaint be in writing; and the admission of evidence as to the attention to complainant of other men is admissible.

[Opinion filed January 22, 1890.]

APPEAL from the Criminal Court of Cook County; the
HON. HENRY M. SHEPARD, Judge, presiding

Mr. JOHN C. HENDRICKS, for appellant.

Mr. HOMER E. TINSMAN, for appellee.

GARY, P. J. "*A dear loved lad, convenience snug,
A treacherous inclination,*"

as Burns sings, or, as the Spanish has it, "a moment of delirium," brought upon this young woman that penalty which we are taught all motherhood suffers for the transgression of the first mother.

Upon the contradictory testimony of the two persons having original and authentic sources of knowledge as to the matter to which they testified, the jury has found that the appellant is rightly charged with the paternity of her child. Her testimony was corroborated by his acknowledgment that on summer evenings they rambled in the bosky parks that adorn the northwestern part of Chicago, and by the testimony of her sister that no young man but the appellant came to see the relatrix, to her knowledge. By the testimony of the relatrix and her sister, the date of the first of those rambles was fixed at August 17, 1888, and the child was born April 29, 1889. If there is no error of law in the case, the verdict of the jury can not be disturbed.

All the matters assigned as error, except as to the preponderance of the evidence and the form of the verdict, are trivial. In this class of cases no transcript of any proceedings before the justice is required to be filed; only the warrant for the arrest of the defendant and the bond for his appearance given by him. Sec. 3, Ch. 17, R. S. Her complaint need not be in writing. *Jones v. The People*, 53 Ill. 366. The admission of the testimony as to attentions by any other man is justified by *Corcoran v. People*, 27 Ill. App. 638.

The other points as to the evidence admitted or rejected and as to instructions have been considered, but there is nothing in them.

The verdict, "We the jury, find that the complaining witness, Ellen McDonald, has been delivered of a bastard child, in the County of Cook and State of Illinois, which is now living, and that the defendant, John J. Curran, is the father of said child," is broader than the issue which the statute (Sec. 4) requires to be submitted to the jury, and yet it does not include the element that she was an unmarried woman, and only an unmarried woman can be a complainant in such a proceeding. *Jones v. People*, 53 Ill. 366.

It is, however, such a verdict as in *Davis v. People*, 50 Ill. 199, was held to be the proper form. There is no error and the judgment is affirmed.

Judgment affirmed.

Sachsel v. Farrar.

DAVID J. SACHSEL

V.

J. HAMILTON FARRAR AND REUEL W. BRIDGE.

35	277
44	206
85	277
54	340

Agency—Real Property—Sale of—Commissions—Claims for, by Two Agents—Interpleader—Answer.

A bill of interpleader requiring two real estate agents to interplead as to which of them shall have certain commissions due upon the sale of a piece of land, each claiming to have made the sale, will not lie; the defense must be at law.

[Opinion filed January 22, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Mr. FRANK H. GOIN, for appellant.

Mr. ARTHUR B. WELLS, for appellee Farrar.

No appearance for appellee Bridge.

GARY, P. J. This is a bill of interpleader filed by the appellee Reuel W. Bridge, requiring the appellant and the appellee Farrar, to interplead as to which of them shall have the commissions to be paid by Bridge on a sale of real property owned by him, which each of them claims to have been effected through his exertions.

If either of them is entitled to commissions it is because of some contract he had with Bridge, and not because of anything that has happened between themselves. Neither of them claims by a title derived from the other. If Bridge has incautiously committed himself with both of them, he must make, at law, the best defense he can to the double claim. It is no case for an interpleader. 3 Pom. Eq., Secs. 1319 to 1329. The answer of the appellant denying the

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title to the relief prayed, and praying the same advantage of his answer as if he had demurred, saves the objection to the case made by the bill, even if a general answer would have waived it. *Ryan v. Duncan*, 88 Ill. 144.

The decree is reversed and the cause remanded with directions to dismiss the bill for want of equity.

Reversed and remanded.

THE PENNSYLVANIA COMPANY AND THE UNION STOCK
YARDS & TRANSIT COMPANY

V.

EDWIN H. ELLETT, ADMINISTRATOR.

*Railroads—Negligence—Crossings—Personal Injuries—Pleading—
Defect in—Verdict—Evidence.*

1. The fact that the trains of a railroad company have for several years been daily run over the track of another company, is *prima facie* evidence of a contract between such companies to that end; and in case the company owning such track takes the ground that the company so using it is a trespasser, the burden of proof is upon it to show that such was the case.

2. In an action brought by an administrator for the recovery of damages for the death of a third person, alleged to have been occasioned by the negligence of railroad companies, this court holds that the fault of the declaration involved was cured by the verdict, and declines to interfere with the judgment in behalf of the plaintiff.

[Opinion filed January 22, 1890.]

APPEAL from the Superior Court of Cook County; the
Hon. KIRK HAWES, Judge, presiding.

MR. GEORGE WILLARD, for appellant Pennsylvania Company.

MESSRS. IRUS COY and R. P. HOLLETT, for appellant Union
Stock Yards and Transit Company.

MESSRS. WILLETT & JOHNSON, for appellee.

GARNETT, J. This is an action on the case to recover damages for the negligence of appellants in causing the death of William R. Walkup.

The occurrence was in the town of Lake, in Cook county, on the crossing of Exchange avenue over the railroad tracks belonging to the Union Stock Yards and Transit Co., immediately in front of the entrance gates to the stock yards, where from 5,000 to 10,000 people pass over the tracks daily. At that point the Transit Company has four separate railroad tracks running parallel, north and south, each of which is separated from the other by a space of only a few feet. About four o'clock in the afternoon of February 14, 1887, Walkup, with a number of other persons, came from the stock yards gates toward the tracks with a view of crossing on Exchange avenue, but they were all stopped by a freight train then going north on the third track from the west. While waiting for the freight train to pass, he stood with a companion, one Trout, on the south side of Exchange avenue near the passing train. When the last car had passed, all the persons waiting moved forward to cross the tracks; Walkup was in the lead and Trout close to him, and in that order they reached the east track. As soon as Walkup was on that track he discovered a train backing southward thereon, which was running about seven miles an hour. He attempted to make his escape, but was knocked down by the train, three trucks of one of the cars passing over his body and killing him instantly. Trout not being so far east as Walkup, drew back in time to avoid injury. There was a verdict and judgment in appellee's favor for \$1,500. To support a motion in arrest of judgment counsel for the Transit Company say that it is not alleged in either count of the declaration that the train of the Pennsylvania Company was on the track where Walkup was killed, by contract, express or implied, with the Transit Company, or even by its knowledge or consent, and that for aught contained in the declaration, the train may have been there by means of a trespass of its owner. But the first count of the declaration alleges that the Transit Company owned the track, and that the Pennsylvania Company had control thereof, and was negli-

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gently backing its train over the same. Now the question arises, is the fault of the declaration cured by the verdict? In 1 Chitty's Pleading, 673, the author says: "The second mode by which defects in pleading may be, in cases, aided, is by *intendment after verdict*. The doctrine upon this subject is founded on the *common law*, and is independent of any statutory enactments. The general principle upon which it depends, appears to be that where there is any defect, imperfection or omission, in any pleading, whether in *substance or form*, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection or omission, is *cured by the verdict*." Considering the declaration entirely separate from the bill of exceptions, we are inclined to think the averment in question is, in its most unfavorable aspect, within the class described by Mr. Chitty. Nor would it be far from plausible to say that, reasonably construed, it means that the Pennsylvania Company was in *lawful* control of the track. If so, it could only be by virtue of some contract with, or permission of, the Transit Company, which was alleged to be the owner. But admitting the allegation to be defective, we think it cured by the verdict, as the issue necessarily required proof of a contract with the Transit Company, or permission from it to run the Pennsylvania Company's train on the track in question.

It is true the bill of exceptions shows no contract between the companies, except what may be implied from the undisputed facts, that the tracks of the two companies were connected by a Y, and the Pennsylvania Company had been in daily use of the same track for the same purpose for several years before the killing of Walkup. But this was *prima facie* sufficient, and the burden was thereby shifted upon the Transit Company to show that the other company was a trespasser. Both appellants insist that the verdict was manifestly against the weight of the evidence, and to that point we have

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devoted earnest attention. That the operation of trains in the manner described in this opinion, over a crossing used as a footpath by thousands of persons during the day, is extremely dangerous to life and limb, can not be denied. The jury, doubtless, took that fact into consideration, together with the other facts and circumstances shown by the evidence, as the failure to have gates erected to prevent persons from going to the tracks while any danger was in sight, the fact that the Pennsylvania train was a regular train passing over the track every afternoon at the same time, the failure of the engineer and the fireman to blow the whistle or ring the bell until the train was almost upon the deceased, and the failure of the flagman to give warning of the approach of the Pennsylvania train until it was too late for Walkup to make his escape. All these facts the jury was warranted by the evidence in believing, and we think the verdict should not be disturbed.

The judgment is affirmed.

Judgment affirmed.

DANIEL H. DORSETT

v.

GEORGE W. CLOTHIER.

Negotiable Instruments — Note — Execution — Improper Remarks by Counsel During Trial.

1. Improper statements of counsel made during the trial of a cause will not justify a reversal unless it appears that they probably had a material influence on the result.

2. In an action brought to recover upon a promissory note, the contention being as to whether the same had been executed by the defendant, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff.

[Opinion filed January 22, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon
ROLLIN S. WILLIAMSON, Judge, presiding.

Messrs. H. T. & L. HELM, for appellant.

Messrs. LYMAN & JACKSON, for appellee.

MORAN, J. The issue of fact which was tried by these parties in the court was, whether the note which was in suit had been executed by appellant. Appellant denied that the note was signed by him, and appellee introduced two witnesses who swore that appellant admitted, when shown the note, that it was all right, and promised to pay it. Complaint is made that appellant was not allowed to cross-examine appellee as to the circumstances which occurred at the time the note was delivered to him. Counsel has not stated what facts or circumstances he expected to prove. There is nothing in the case from which we can see anything material was excluded by the court's ruling.

We conclude, from the argument of counsel, that the facts which he sought to draw out by the questions excluded were the same as those stated in the deposition of appellee, which deposition the court would not allow appellant to read. If we are right in this, we can not see that there is any materiality in those facts; certainly the exclusion of them was not injurious to appellant.

Complaint is made of the remarks made by appellee's counsel in statement, and in argument to the jury. Perhaps the statements were not all entirely legitimate, but some of the parts excepted to were not outside the line of argument. Such exceptions are difficult to deal with by a reviewing court, but we think the true rule is that they will not constitute ground of reversal, unless it appears that the improper remarks probably had a material influence on the result.

We do not think the statements complained of were of such a character as to authorize us to disturb a verdict clearly warranted by the evidence.

The judgment of the Circuit Court must be affirmed.

Judgment affirmed.

WILLIAM J. McDONALD

V.

THE WESTERN REFRIGERATING COMPANY.

35 283
54 154
54 155

Warehousemen—Receipt—Mistake—Sale—Redemption of with Knowledge—Estoppel—Abatement—Partnership.

1. The knowledge of one of several co-partners as to a matter of firm business must be looked upon as the knowledge of the firm.

2. The transfer to an innocent party of a warehouse receipt erroneously claiming to cover goods in store of a given firm, a member thereof knowing of such mistake, will render such firm liable to the warehouseman as trustee of the receipt or the proceeds thereof.

3. In an action brought by a warehouse company to recover an amount paid to redeem a receipt given by it, the same through mistake claiming to cover goods in its hands, this court holds, that the defendant can not, in the absence of a plea in abatement, raise the point of the non-joinder of a co-partner, that, in view of the facts, he is estopped from taking the position that payment by the plaintiff to the holder after knowledge of the mistake operated as a bar to the recovery thereof; and declines to interfere with the judgment for the plaintiff.

[Opinion filed January 22, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

This case was submitted to the court below on the following agreed statement of facts:

The Western Refrigerating Company, plaintiff, and William J. McDonald, defendant, in the above entitled cause, now pending and undetermined in said court, in pursuance of the statute in such case provided, do hereby make this an agreed case, and stipulate as follows to wit: That on the 27th day of October, 1888, the plaintiff filed its declaration containing the common counts, consolidated in due form; that on the 27th day of October, 1888, the defendant filed his plea of the general issue to said declaration, to which the plaintiff added a *similiter*, that the facts of the matter are as follows, to wit:

That during the year 1887, until August 23, 1887, the said defendant and one Amandus Bennett were partners, trading as McDonald & Bennett, and as such partners dealing in eggs and other produce in Chicago, in said county; that said plaintiff was then and there and now is engaged in the cold storage and warehouse business, storing and warehousing certain classes of goods other than grain; that during the year 1887, prior to May 25, 1887, said McDonald & Bennett placed on storage in the warehouse of said plaintiff, 472 cases of eggs; that said 472 cases of eggs were and are all the eggs said McDonald & Bennett ever had on storage with the said plaintiff; that on May 25, 1887, the said plaintiff issued to said McDonald & Bennett a receipt, commonly known as a warehouse receipt, for 300 cases of said 472 cases of eggs; that on August 6, 1887, the said plaintiff issued to said McDonald & Bennett another such receipt for 100 more cases of said 472 cases of eggs; that on August 10, 1887, the said plaintiff issued to said McDonald & Bennett another such receipt for fifty more cases of said 472 cases of eggs; that after the issue of said receipts on August 10, 1887, said McDonald & Bennett had on storage with said plaintiff only twenty-two cases of eggs for which such receipts had not already been delivered to them; that said Bennett had personally attended to the business of storing all said eggs with said plaintiff; that said Bennett knew how many eggs said McDonald & Bennett had upon storage with said plaintiff; that said Bennett had personally gone to said plaintiff and obtained said receipts for 300 cases, 100 cases and fifty cases of eggs for said McDonald & Bennett; that said Bennett knew how many eggs said McDonald & Bennett had upon storage with said plaintiff after the issuing of said receipts for 300 cases, 100 cases and fifty cases of eggs, for which such receipts had not already been issued by said plaintiff to said McDonald & Bennett; that said defendant did not know how many eggs McDonald & Bennett placed upon storage with said plaintiff; that said defendant did not know that said receipts for 300 cases, 100 cases and fifty cases of eggs had been issued by said plaintiff to said McDonald & Bennett, and delivered to said

Bennett; that said defendant did not know how many eggs said McDonald & Bennett had upon storage with said plaintiff after the issue of said receipts for 300 cases, 100 cases and fifty cases of eggs, for which such receipts had not already been issued to said McDonald & Bennett; that on the 17th day of August, 1887 (said defendant and said Bennett each having the knowledge above ascribed to him respectively), said defendant went to the office of said plaintiff and inquired of said plaintiff how many eggs said McDonald & Bennett had upon storage with said plaintiff, for which it had not already issued receipts to said McDonald & Bennett, and requested said plaintiff to issue a receipt to said McDonald & Bennett for the number of eggs said McDonald & Bennett then had upon storage with said plaintiff, for which it had not already issued such receipts to said McDonald & Bennett; that said plaintiff then and there, in response to said inquiry and request of said defendant, said there were yet 122 cases of eggs there, and issued to said McDonald & Bennett another such receipt for 122 cases of eggs and delivered the same to said defendants; that said plaintiff did not intend to issue, nor did it then believe that it had issued said last mentioned receipt for any more eggs than said McDonald & Bennett had upon storage with said plaintiff, for which such receipts had not already been issued to them; that said last mentioned receipt was issued for 122 cases of eggs instead of for twenty-two cases of eggs, by reason of the mistake of the book-keeper of said plaintiff in computing the number of cases of eggs said McDonald & Bennett then had upon storage with said plaintiff, for which such receipts had not already been issued to said McDonald & Bennett; that said McDonald & Bennett did not expect to receive such a receipt for any more eggs than they had upon storage with said plaintiff for which such receipts had not already been issued to them; that said defendant would not have taken said receipts for 122 cases of eggs if he had known that said McDonald & Bennett then had only twenty-two cases of eggs upon storage with said plaintiff, for which such receipts had not already been issued to said McDonald & Bennett; that said defendant on the day

that he received said receipt for 122 cases of eggs showed it to said Bennett and talked with him about it; that said Bennett then and there knew that said receipt for 122 cases of eggs had been issued for 100 more cases of eggs than said McDonald & Bennett then had upon storage with said plaintiff, for which said plaintiff had not already issued such receipts to said McDonald & Bennett, but such fact was not actually known to said McDonald; that said McDonald & Bennett dissolved partnership by agreement on August 23, 1887; that by such dissolution said defendant retained all the assets of said McDonald & Bennett except the proceeds of the sale of said receipts for 100 cases and fifty cases of eggs; that said receipts for 300 cases and 122 cases of eggs were indorsed by said McDonald & Bennett to said defendant upon said dissolution; that said defendant then and there assumed the liabilities of said McDonald & Bennett; that said Bennett upon and after said dissolution of partnership was indebted to said defendant in about the sum of \$600; that said defendant sold said receipts for 300 cases and 122 cases of eggs, the latter part of December, 1887, to Cougle Bros., for the value thereof; that said Cougle Bros., when they purchased and paid therefor, were unaware of said mistake; that before said plaintiff became aware of said mistake, it delivered to said Cougle Bros. 422 cases of said 472 cases of eggs and took up said receipts for 300 cases and 122 cases of eggs and canceled them; that on August 16, 1887, said Bennett sold and indorsed it in the name of McDonald & Bennett, aforesaid, and delivered said receipts for 100 cases and fifty cases of eggs to Summers, Morrison & Co., and then and there received therefor the sum of \$750; that said defendant did not then and there know of the last mentioned sale by said Bennett; that the last mentioned sale by said Bennett was then and there by him solely made for, and the proceeds thereof were then and there by him solely appropriated to the use of said Bennett himself; that when said Summers, Morrison & Co. purchased and paid for said last mentioned receipts, they were not aware of said mistake or fraud; that soon thereafter said Summers, Mor-

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rierson & Co. transferred said last mentioned receipts to the Metropolitan Bank as collateral security for their indebtedness to said bank; that said bank has so held said last mentioned receipts until the latter part of December, 1887; said Bennett purchased said last mentioned receipts from said Sammers, Morrison & Co. and paid therefor the sum of \$850; that before the third day of February, 1888, and before said plaintiff became aware of said mistake, it delivered to said Bennett fifty cases of said 472 cases of eggs, and took up from him said receipt for fifty cases of eggs and canceled it; that on the 3d day of February, 1888, said Bennett presented said receipt for 100 cases of eggs to said plaintiff, and demanded 100 cases of eggs; that said plaintiff never knew or had the slightest suspicion of its said mistake until after the presentation of the last mentioned receipt upon the last mentioned date; that all the said receipts, except the last mentioned receipt, had been taken up and canceled as aforesaid before the 3d day of February, 1888; that on the day last aforesaid, after the presentation of said receipt for 100 cases to the plaintiff as aforesaid, the president of said plaintiff went with said defendant to the office of the attorney of said defendant; that on conference there had, said defendant's attorney advised said plaintiff to file the bill in chancery hereinafter mentioned; that said plaintiff on the day last aforesaid, thereafter advised with his own attorneys, and upon the 4th day of February, 1888, it filed its bill in chancery in the Superior Court of said county against said Bennett, praying that he be restrained, by injunction, from transferring or assigning said receipt for 100 cases of eggs, and that he be ordered to deliver the same up to be canceled; that a writ of injunction was on the last day aforesaid issued and served upon said Bennett; that the counsel in said last mentioned cause of said plaintiff, during the progress thereof, conferred repeatedly with said W. J. McDonald, advised him of the allegations and evidence offered by said Bennett, and sought through said McDonald countervailing proof; that said McDonald made an affidavit in said chancery suit, which was read upon the hearing thereof; that said McDonald was in

court voluntarily at different times, when it was expected said chancery suit would be heard; that on April 18, 1888, upon motion of said Bennett said injunction was, by Henry M. Shepard, one of the judges of said Superior Court, dissolved; that on April 30, 1888, said cause in chancery came on to be finally heard before Judge Henry M. Shepard; that the counsel in said cause knew of no evidence that would aid said plaintiff in addition to that read upon the motion to dissolve the injunction, and for that reason stipulated that said cause in chancery might be finally heard upon that evidence; that upon such final hearing on the day last aforesaid a decree was entered, which found that said receipt for 100 cases was then and ever had been a valid receipt, and dismissed said bill in chancery and assessed damages against said plaintiff for suing out said injunction; that thereafter on the day last aforesaid said plaintiff paid said Bennett the damage so assessed as aforesaid, and \$450 for said receipt on 100 cases of eggs; that \$450 was the market value of said last mentioned receipt (less what the eggs were packed in) on February 3, 1888; that said defendant McDonald, received \$620.72 for said receipt for 122 cases of eggs on January 5, 1888; that said McDonald at last mentioned date received \$484.14 for the 100 cases of eggs mentioned in said last mentioned receipt, in addition to and over and above what he then received for the first twenty-two cases of eggs in said last receipt, mentioned; but said 122 cases of eggs were sold and paid for in one lot; that said McDonald received the said last mentioned sum in money, and after April 30, 1888, and before the beginning of this action, he refused to pay said plaintiff said \$484.14 or any other sum of money whatever because of the premises.

It is further stipulated and agreed as above that said McDonald did not, after August 16, 1887, own said receipts for 100 cases and fifty cases of eggs, or either of them, or any part, portion or interest therein. It is further stipulated and agreed by and between said parties to this action, that the point of law at issue between them is as follows, to wit: Under the foregoing stipulation and agreement is the said plaintiff entitled to recovery of said defendant McDonald?

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And it is further stipulated and agreed upon between the parties to this action, that upon the foregoing agreed case, containing the points of law at issue between them, and filed in said cause, the court shall decide in the same manner as if the facts aforesaid were proved upon the trial of said issue, in pursuance of the statute in such case provided, and it shall find that the said plaintiff is entitled to recover against the said defendant; it shall render judgment in favor of the plaintiff against the said defendant for the sum of \$484.14, and the costs of suit to be taxed by the clerk, and if it shall find that the plaintiff is not entitled to recover, it shall render judgment in favor of the defendant, against the plaintiff, dismissing the plaintiff's suit, and for the costs of suit to be taxed by the clerk.

The court found for the plaintiff for \$484.14, and gave judgment accordingly, and from said judgment this appeal is prosecuted.

Messrs. C. H. & C. B. Wood, for appellant.

Payment having been voluntarily made with full knowledge of all the facts, the law is well settled that the money can not be recovered back. *Elston v. Chicago*, 40 Ill. 514; *Brumagim v. Tillinghast*, 18 Cal. 265; *Evans v. Gale*, 17 N. H. 573; *Jones v. Wright*, 71 Ill. 61; *Frambers v. Risk*, 2 Ill. App. 499.

The fact that the plaintiff did not properly present its case, or even if it was misled by the Superior Court, would not give it any right to recover the money back. The defendant was no party to the suit in the Superior Court, and though he advised the bringing of that suit, we think that was correct, because Bennett had no right to that receipt; he had paid nothing for it, and could not collect it of the plaintiff by any suit whatever.

We understand it to be a clear head of equity jurisdiction, that a court will enjoin the negotiation of commercial paper when obtained through improper means. 2 High on Injunctions, Sec. 1126.

A warehouse receipt can not occupy any better position than negotiable paper.

The plaintiff settled this matter knowing that it was an unjust demand, and now it wants to recover of the defendant, who was in nowise to blame, for its own negligence. This can not be done. *Patterson v. Cox*, 25 Ind. 261; *Newell v. March*, 8 Iredell (N. C.) 443; *Williams v. Colby*, 44 Vt. 40; *Watson v. Cunningham*, 1 Blackford, 321; *Clancy v. McEnery*, 17 Wis. 177.

This judgment upon the facts can not be maintained against McDonald alone.

The contract in contemplation of law arising with both partners, they must both be joined. *Page v. Brant*, 18 Ill. 38.

The implied contract being joint, the joint cause of action must be proven, and even if the objection does not appear upon the pleadings, the plaintiff may be non-suited upon the trial if he fail in proving a joint contract. *C. & St. L. R. R. Co. v. Easterly*, 89 Ill. 158.

The proof should be the same as if all the parties to the joint contract had been sued before a recovery can be had against any. *Griffith v. Furry*, 30 Ill. 252; *Rosenberg v. Barrett*, 2 Ill. App. 386.

MESSRS. GEORGE C. FRY and JAMES E. BABB, for appellee.

Whenever one person, through mistake, obtains the legal title to or apparent ownership of property which belongs to another, the former person holds such property in trust for the use of the latter. *Holland on Jurisprudence*, 4th Ed., 206; *Perry on Trusts*, 1st Am. Ed., Sec. 186; *Pomeroy on Equity Jurisprudence*, Vol. 2, Sec. 981; *Cutts v. Guild*, 57 N. Y. 235; *McCloskey v. McCormick*, 44 Ill. 336.

The mistake in this case was of such a character, and made under such circumstances as to diligence on the part of the plaintiff, innocence on the part of the defendant, and otherwise, that the defendant as indorsee of McDonald & Bennett, if he had notice, held for the use of the plaintiff the 122-case receipt, over and above the first twenty-two cases thereof, and the money received therefor. *Kingston Bk. v. Etlinge*, 40 N. Y. 325; *Clark v. Eckroyd*, 12 Upper C. App. Rep. 428; *Kansas Lumber Co. v. Central Bk. of Kas.*, 34 Kas. 635; *Citi-*

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zens' Bk v. Graffin, 31 Md. 507; U. S. v. Onondaga Co. Sav. Bk., 39 Fed. Rep. 259; McCloskey v. McCormick, 44 Ill. 336; McLean Co. Bk. v. Mitchell, 88 Ill. 52; Wolf v. Beaird, 123 Ill. 585.

While the plaintiff in this case was no more negligent than was the plaintiff in any of the cases cited under proposition second above, yet negligence is immaterial, unless it appear that the defendant was not charged with knowledge of the mistake, and in consequence has altered his position, and the burden is upon defendant to show such lack of knowledge and alteration of position. Walker v. Conant, 31 N. W. (Sup. Ct. Mich.) 786; Mayor v. Mayor, 63 N. Y. 457; U. S. v. Onondaga Sav. Bk. 39 Fed. R. 259.

Delay in discovering a mistake will not preclude a recovery. Only delay in making it known after discovery will have that effect. Nat. Bk. of Com. v. Nat. Mechs. B. Ass'n, 55 N. Y. 217; Canal Bk. v. Bk of Albany, 1 Hill, 287; Bk. of Com. v. Union Bk., 3 Comst. 236; Clark v. Eckroyd, 12 Upp. C. App. Rep. 428.

The knowledge which defendant's partner had of the plaintiff's mistake, charged the defendant with knowledge as effectually as if he had had actual knowledge. Black v. Bird, 1 Haywood (N. C.), 273; Puller v. Roe, 1 Peake's N. P. 260; Jacaud v. French, 12 East, 317; Bigelow v. Henniger, 33 Kas. 362; Marietta & C. Ry. Co. v. Mowry, 28 Hun, 79; Capelle v. Hall, 12 Nat. Bankruptcy Reg. 5 and 6; Story on Partnership, 6th Ed., Sec. 236; Snarr v. Small, 13 Upp. C. Q. B. Rep. 125; Stevenson v. Woodhull, 19 Fed. R. 575; Manny v. Glendenning, 15 Wis. 53; Otis v. Adams, 41 Me. 258; Sparrow v. Chisman, 9 Barn. & C. 241; Quinn v. Fuller, 7 Cush. 224.

The plaintiff is not estopped to show its mistake because, first, the defendant was charged with knowledge of the mistake, and therefore, according to Bigelow v. Henniger, 33 Kas. 362, cited and reviewed *supra*, had no right to rely upon the plaintiff's representation; and because, second, it does not appear that the defendant has altered his position to his detriment by reason of the mistake.

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The plaintiff lost no rights as against this defendant, when it paid Amandus Bennett for said receipt for 100 cases of eggs, for the following reasons:

Because said Bennett had a good title to that receipt; and while the plaintiff may have had some right of remedy against said Bennett and his partner, because of said mistake, yet such right of the plaintiff was not such as to relieve it from honoring the said receipt.

Because, defendant's firm, having sold and received the value of said receipt, he needed and was entitled to no protection against it, even if Bennett had no title thereto; *i. e.*, the receipt by him of its value, rendered the validity of the title thereof, which plaintiff honored, immaterial to him. *Graves v. Harwood*, 9 Barb. 477.

Because the sale of said receipt by defendant's firm, and the receipt of value therefor, which is still retained, estops the defendant from asserting the invalidity of said receipt, or the title thereto. Defendant can not hold the benefits and escape the burdens of said receipt's validity. *Thomas v. Quintard*, 5 Duer, 81; *Cornwall v. Davis*, 38 Fed. R. 882; *Mills v. Hoffman*, 92 N. Y. 182; *Challiss v. McCrumb*, 22 Kas. 157; *Drennan v. Bunn*, 124 Ill. 186; *Mida v. Geissmann*, 17 Ill. App. 212.

Because the adjudication in *Western Refrigerating Co. v. Bennett*, that said Bennett had a good title to said receipt, is binding upon the defendant here. *Drennan v. Bunn*, 124 Ill. 175; *Bigelow on Estoppel*, 4th Ed., 125 and 126.

The plaintiff lost no rights against this defendant when it honored the fifty-case receipt, for the same reasons above given with reference to the one hundred-case receipt, except the last, and for the additional reason, that when it was honored the plaintiff had not discovered the mistake.

The consequences of the mistake can not be shifted from the receipt in which it was made, to the one hundred-case receipt. *Martin v. His Creditors*, 14 La. An. 394; *Skilling v. Bollman*, 6 Mo. Ap. 80; *Barber v. Meyerstein*, L. R. 4, H. L. 317.

This action is based, not upon the joint obligation of the

defendant and his partner, but upon the implied promise of the defendant alone, growing out of the receipt by him, after the partnership was dissolved, of money for property, the title to which he acquired, with notice that it was held for the use of the plaintiff.

To raise the objection (even if it existed) that this action against only one of the partners is based upon a partnership obligation, it is necessary that the defendant should have pleaded in abatement. *Bates on Partnership*, Vol. 2, Sec. 1050; *Paschel v. Hoover*, 16 Ill. 340.

C. & St. L. R. R. Co. v. Easterly, 89 Ill. 158, is not in point, because there is a distinction between the right to avail of a non-joinder and a mis-joinder without pleading in abatement. See 1 Chitty's Pl. 44-46.

The record of this case in this court does not present any question which this court can consider, for the following reasons:

The stipulation in the record by which an agreed case purports to be made, under Sec. 74, Chap. 110, of the statutes of Illinois, does not set out any "point of law at issue between" the parties as required by that section. *State Bk. v. St. L. Ry. Co.*, 122 U. S. 21; Sec. 74, Chap. 110, Rev. Statutes of Illinois, Vol. 2, p. 1837, Starr & Curtis' Ed.; *Desty's Federal Procedure* (last Ed.), Sec. 652, 258.

The stipulation for an agreed case, not being such as is required by the statute, this court can only review the case as it is shown by the bill of exceptions. *W., St. L. & P. Ry. Co. v. Goodwine*, 18 Ill. App. (middle of page 66).

The propositions of law in the bill of exceptions can not be reviewed, because the facts are not embodied therein. The court can not look to the facts in the stipulation, because it is not in the bill of exceptions. *Leavitt v. Randolph Co.*, 85 Ill. 507; *Wilson v. McDowell*, 65 Ill. 522.

The exceptions recited by the clerk in the record of the judgment, to the overruling of the motion for a new trial and to the entry of the judgment, avail nothing. *Wolf v. Campbell*, 23 Ill. App. 482; *Firemen's Ins. Co. v. Peck*, 126 Ill. 493.

MORAN, J. Appellant contends that the receipt in which the mistake was made was the one which, in the dissolution of the partnership, went to Bennett; and as appellee paid Bennett with knowledge of the mistake, the money could not be recovered back, and that it could not be recovered back from appellant under the circumstances of this case, and the refusal by the trial court to hold propositions embodying such contention is pressed for error.

As appellant's points all arise on the statement of facts, it is unnecessary to consider the formal propositions submitted to the court to be held. The question is, upon the facts as stated, is the judgment of the court proper?

The last receipt issued by appellee to McDonald & Bennett, dated August 17, 1887, was for 100 cases of eggs more than said firm had on store with appellee, and such issue is agreed to have been made by mistake of fact on the part of appellee, and the mistake is shown to have been known to Bennett on the day it was made, and before there was any dealing with the receipt by the firm. How did this knowledge of Bennett affect the firm? We think it clear and well sustained by authority, that such knowledge by one partner is not only notice to the firm of the facts, but that it must in law be held to be the knowledge of his co-partner, for what is known to the firm must be taken to be known by all the persons composing the firm, where the matter relates to the firm business or transactions. 1 Bates on Partnership, Secs. 390-391 and cases cited in notes.

If then the firm had, in the regular course of business, transferred to an innocent party the warehouse receipt in question, and had received the money therefor, there can be no doubt but that said firm would be liable to appellee for the money, for the circumstances would make the firm a trustee of the receipt, or of the proceeds thereof for appellee. Kingston Bank v. Etlinge, 40 N. Y. 394; Kansas Lumber Co. v. Central Bk. of Kas., 34 Kas. 635; McLean Co. Bank v. Mitchell, 88 Ill. 52.

Defendant is liable for the money or property received by the firm for the use of appellee, and the non-joinder of his

co-partner could only be pleaded in abatement. There was no such plea, and the point that Bennett should be sued with defendant can not be made on this record.

As to the suggestion that appellee has paid to Bennett the amount represented by the receipt, after knowledge of the mistake, and is therefore barred, the circumstances set out estopped appellant from taking that position. It appears that on a conference with appellant and his attorney, after the mistake was discovered, as to what should be done, appellant's attorney advised appellee to institute the chancery suit against Bennett, which was soon after commenced, and that appellant was advised of its progress and aided by his evidence and suggestion in its prosecution.

As we have already seen, appellant was at that time liable to appellee, as a member of the firm, for the receipt or its proceeds; it is manifest, therefore, that a suit to collect from Bennett alone, or to prevent his negotiation of the receipt, was in the interest of appellant. Under such circumstances he was bound by the result of that litigation whether the case was correctly decided or not.

This proposition is fully sustained by the case of *Cole v. Favorite*, 69 Ill. 457. The Supreme Court there said: "Whether the suit in the Federal Court was decided correctly or not, can make no difference in the result of this case. The suit in the Federal Court, although in the name of appellee, was prosecuted at the request, and for the benefit of appellant. He advised and directed it, was a witness therein, and while he was not formally a party to the record, he was a party in interest, and must be regarded a privy. In that suit it was adjudicated and determined that the receipt was a contract, and by its terms and conditions appellee was not liable to appellant to insure the barrels therein named after first of September, 1865. * * * The merits of this question have been previously tried, and parties and privies must be concluded."

The question there decided is in principle applicable here. See also *Drennan v. Bunn*, 124 Ill. 175.

The judgment of the Circuit Court is right, and will therefore be affirmed.

Judgment affirmed.

JOHN NASH
v.
JULIA BURNS.

Trespass—Writ of Restitution—Acts in Execution of—Evidence—Practice.

Counsel should not be permitted in civil cases to read law to the jury.

[Opinion filed January 22, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Messrs. JOSEPH N. BARKER and CLIFFORD & SMITH, for appellant.

Mr. S. K. Dow, for appellee.

GARY, P. J. It is unnecessary to inquire whether this judgment should be sustained, if the error for which it is to be reversed were not in the record.

This is an action of trespass for acts done in the execution of a writ of restitution, issued upon the judgment by confession, reversed by this court in *Burns v. Nash*, 23 Ill. App. 552.

On the trial of the present case, the opinion of this court in that, was, against the objection and exception of the appellant, read by the appellee in the evidence to the jury.

Since the case of *Chicago v. McGiven*, 78 Ill. 347, it is impossible to justify this, nor can it be overlooked upon the flattering statement in the brief of the appellee that "the opinions of this court are good reading and will not hurt anybody."

A defendant in an action for unliquidated and vindictive damages, against whom a few lines, near the bottom of page 557 of that opinion, were read as a text for a closing speech by the plaintiff's counsel, would not be apt to concur in that statement. The judgment is reversed and the case remanded.

Reversed and remanded.

Covel v. Benjamin.

MILO COVEL

v.

EDWIN BENJAMIN ET AL.

35	297
72	342

Contracts, Written and Oral—Patent Rights—Assignment—Partnership—Evidence.

1. All oral negotiations and agreements between parties, which precede the reduction of their contract to writing, will be treated as merged in the writing, and where a writing expresses certain things to be performed by one party upon a consideration moving from the other, it is not competent to prove by parol that some other thing, in addition to those stated in the writing, was also and before or at the time of the making of the writing, agreed to be performed upon the same consideration.

2. Evidence is admissible to show that part only of a contract was reduced to writing, and parol evidence may be introduced to supply the rest of the agreement.

3. An assignment by less than the full number of the members of a given firm, of patents owned by it, conveys only their interests therein after the payment of the partnership debts.

4. Upon a contention touching the assignment of interests in certain patent rights, it being claimed by the assignee that a certain written contract did not fully express the arrangement between the parties, and that the subsequent assignment to him of certain claims against third persons named, was upon the same consideration as the agreements and undertakings contained in the said written contract, this court declines to interfere with the decree of the trial court, holding that said written contract contained the whole agreement of that date, and that at that time no agreement to assign said claims was entered into.

[Opinion filed January 22, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Messrs. W. W. GURLEY and WILLIAM GARNETT, JR., for appellant.

Mr. F. W. PARKER, for appellees.

MORAN, J. The main subject of contention between the parties in this litigation relates to their respective rights and interests in certain letters patent for improvements in machines for sharpening saws.

The record in the case is very voluminous, the contentions of the parties varied, and the facts involved, and no attempt will be made here to state in detail the testimony of different witnesses, or the contradictions and inconsistencies which appear to be characteristic of the evidence given by each of the parties in interest.

The turning point in the controversy relates to the question as to whether certain written contracts which were executed on May 17, 1886, between appellant and appellees, Litchfield and Benjamin, contained all the agreements that were entered into at that time. Appellant's contention is, that some days prior to the execution of such written contract, negotiations were had and agreements made between himself and said appellees, and that said written contracts do not contain or fully express the arrangement between the parties; that in addition to the assignment of said appellees' respective interests in the certain letters patent in said written contracts mentioned, said appellees respectively agreed to assign to complainant certain claims which they held against the firm of Halladay, Litchfield & Co., which said agreement was upon the same consideration as the agreements and undertakings in the said written contracts of May 17th contained.

Written assignments conveying said claims were executed by said Litchfield and Benjamin in November, 1886, and while it is not pretended that any new or independent consideration passed from complainants for such written assignments, it is sought to connect them with the transactions of May 17, 1886. The master heard testimony at large as to what was the settled agreements of May 17, 1886, and reached the conclusion that the written contracts of May 17th contained the whole agreement of that date between the parties, and that there was at that time no agreement made by Litchfield and Benjamin to assign claims held by them or either of them against the firm of Halladay, Litchfield & Co. This view of the matter was confirmed by the decree entered by the court upon the hearing and, after a careful examination of the record and a consideration of the arguments of counsel, we are of the opinion that the conclusion was right, whether treated as a question of law or a question of fact.

Covel v. Benjamin.

It is a well settled rule of law that all oral negotiations and agreements between parties, which precede the reduction of their contract to writing, will be treated as merged in the writing, and that where a writing expresses certain things to be performed by one party, upon a consideration moving from the other, it is not competent to prove by parol, that some other thing in addition to those stated in the writing, was also and before or at the time of the making of the writing, agreed to be performed upon the same consideration. Therefore, if the court went upon this rule of law and disregarded all the evidence offered, as tending to add to the terms of a written instrument, the ruling was right. But if, as counsel for appellant contends, it was not intended by the evidence to change the terms of the written contract, but to show that part only of the contract of the parties, was reduced to writing, and to supply, by parol evidence, the rest of the agreement, and we assume that course to be legally admissible, we are satisfied that the proof failed to show the contract to assign the claims on which complainant relies. The patents owned by Halladay, Litchfield & Co. were the property of the firm, and not the individual property of the respective persons constituting said firm, and the assignments of Litchfield and Benjamin to complainant, made in November, 1886, if binding upon them as individuals only, conveyed their interest in the firm patents after the payment of the partnership debts.

It would serve no useful purpose to discuss other points in the controversy.

The decree of the Superior Court was right, and will therefore be affirmed.

Decree affirmed.

GARNETT, J., took no part in the consideration of this case in this court.

JAMES MAXWELL AND HENRY B. MAXWELL

v.

HENRY KOERITZ.

Mechanics' Liens—Subcontractor—Creditor—Statement of Account—Failure to File—Appeal.

1. Upon an appeal from a decree awarding a mechanic's lien, the record should definitely show that the same was against the right property.

2. In the case presented, this court holds that the word "creditor" in Sec. 4, Chap. 82, R. S., as amended, does not mean subcontractor.

[Opinion filed January 22, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Mr. S. M. MEEK, for appellants.

Messrs. RUNYAN & RUNYAN, for appellee.

GARNETT, J. Appellee filed in the court below a petition to enforce a lien for the price of brick, which he furnished for a building of appellants situated in Chicago.

The petition alleges that the building was on lots 25, 26, 27, 28 and 29 in sub-block one (1) of David B. Lee's subdivision of block 15, in Johnson & Lee's subdivision, and the decree awarded a lien for \$1,154.25 in favor of appellee against the five lots.

The evidence shows that the lots are each twenty-five feet front, making a total of 125 feet, and that the building is only 100 feet front. But whether the building is erected wholly on lots 25, 26, 27 and 28, or wholly upon lots 26, 27, 28 and 29, or upon part of each of lots 25 and 29 and all of the other three lots, is left wholly uncertain by the evidence. We can not guess that it is situated one way or the other, but as all the evidence is preserved in the record, it should appear affirmatively that the decree is against the right property and no other. *Preston v. Hodgen*, 50 Ill. 561; *Carne v. Truman*, 103 Ill. 321; *Secrist v. Petty*, 109 Ill. 188.

The original contractor with appellants was one Hayes, and appellee made his contract with Hayes, thus becoming a subcontractor.

Appellants contend that Sec. 4, Chap. 82, R. S., as amended by act approved May 31, 1887, and in force July 1, 1887, applies to subcontractors, and therefore appellee can not have a lien as he did not file with the clerk of the Circuit Court a statement or account of his demand. The section enacts that "every creditor or contractor who wishes to avail himself of the provisions of this act shall file with the clerk of the Circuit Court of the county in which the building, etc., to be charged with the lien, is situated, a just and true statement or account or demand due him, etc. Any person having filed a claim for a lien, as provided in this section, may bring a suit at once to enforce the same," etc. The word "creditor," as used here, is somewhat ambiguous. It might be used to describe a subcontractor, or it might mean one who has agreed with the owner of the premises to furnish material only, without performing any labor on the improvement; one who sells building materials but does nothing else toward the erection of the improvement, is commonly regarded as a merchant or dealer, and not as a contractor.

The first twenty-eight sections of Chap. 82, apart from some provisions therein regulating pleading and practice, relate to persons known as original contractors. Subcontractors are not mentioned before Sec. 29, and the word "creditor" is not used in the act after Sec. 28. But comparison of Sec. 4, as amended, with other sections of Chap. 82, makes it quite certain that "creditor" in Sec. 4, does not mean subcontractor.

By Sec. 28 no creditor is allowed to enforce a lien to the prejudice of any other creditor, incumbrancer or purchaser, unless a claim for a lien shall have been filed with the clerk of the Circuit Court, as provided in Sec. 4, within four months after the last payment shall have become due, and unless suit shall be commenced within two years after filing such claim the lien is to be vacated. Sec. 31 requires the subcontractor to give notice of his lien within forty days from the completion of his contract or within forty days after pay-

ment should been made to him. By Sec. 37, if the money due the subcontractor shall not be paid within ten days after such notice is given or within ten days after the money shall have become due, and any money shall then be due from the owner to the original contractor, the subcontractor may file his petition and enforce his lien. And by Sec. 47, no petition shall be filed or suit commenced to enforce the lien created by Sec. 29 unless the same is commenced within three months from the time of the performance of the subcontract; but any delay in commencing suit, caused in consequence of the amount not being due the original contractor, shall not be reckoned.

To simplify the matter we will suppose that the improvement is finished at the same time that the subcontractor completes his part of the work, and that the contract price for the whole work then becomes due to the original contractor, and the contract price for his part of the work becomes due at the same time to the subcontractor. How can the latter proceed so as to protect his lien? If Sec. 4 applies to subcontractors he might at once file with the circuit clerk his account and immediately thereafter begin suit. But the express provisions of Secs. 30, 31 and 37 require him, first, to give notice of his lien and then to wait ten days before bringing suit. Then by Sec. 28 a "creditor" is given four months after the last payment becomes due to him within which he may file his account with the clerk of the Circuit Court and two years thereafter for bringing his suit, while Sec. 47 provides that no suit shall be commenced to enforce a subcontractor's lien unless it is filed within three months after the performance thereof. What is required of a subcontractor by Sec. 47 is manifestly incompatible with the privileges given to a "creditor" by Sec. 4.

We think, therefore, that there is no difficulty in saying that the word "creditor" in that section does not mean subcontractor. No error is found in the record other than that pointed out.

The decree is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

Deimel v. Brown.

SIMON DEIMEL ET AL.

V.

WILLARD S. BROWN ET AL.

35	303
136	586
35	303
73	127
35	303
77	360

Creditors' Bill—Answer under Oath—Books of Account—Mutilation of—Evidence.

1. A book of account undeniably mutilated is unentitled to credit.
2. Upon a creditors' bill filed for the purpose of reaching funds alleged to be due from defendants to a third person, said bill calling for answer under oath as to whether payment had been made by defendants for certain goods purchased by them from such third person, and if so, in what manner, this court holds, that the answer alleging payment is evasive and not responsive to the interrogatory; that the form of the oath makes the whole answer on information and belief, there being no way of distinguishing between the matters so stated, and those of which defendants had knowledge; that the answer is only to be treated as a pleading setting up affirmative matter of defense to be duly proved; that the evidence does not justify the claim of payment, and declines to interfere with the decrees in behalf of the plaintiffs.

[Opinion filed January 29, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Messrs. MOSES, NEWMAN & PAM, for appellants.

Messrs. TENNEY, HAWLEY & COFFEEN, CRATTY BROS. & ASHCRAFT and E. C. CRAWFORD, for appellees.

GARY, P. J. The appeal in this case is by the consent of the parties treated as one, though in fact there were several decrees in the Superior Court in favor of different judgment creditors of Jacob Biersdorf. There is but one issue in the case. Appellants admit that in February, 1884, they bought from Biersdorf goods to the value of \$14,700. If they ever paid for them, these decrees are wrong, if not, right.

The bill called for answer under oath, and contained this interrogatory:

"4th. Has said plush ever been paid for, and if so, when and in what manner; if in cash state how much cash was paid and whether in currency or check and when such payment was made; if in merchandise, state what the merchandise consisted of, its value and the specific dates when such articles were delivered to said Biersdorf. If paid by offsetting mutual accounts, state when such settlement was made, how much said Biersdorf then owed you, the nature of such indebtedness; if any part thereof was for money advanced, when such advance was made, the amount thereof, and whether in currency or by check; if any part thereof was for merchandise sold said Biersdorf, state fully the items, giving the dates and amounts of each sale and the nature of the articles sold." To which the appellant answered :

"4th. To interrogatory 4 they say that said plush has been paid for in the following manner : Said Jacob Biersdorf on or about the 29th day of January, 1884, purchased from these defendants lumber and merchandise to the amount of about \$12,787, and on February 7, 1884, to the amount of about \$5,502.50 and afterward became indebted upon other transactions to these defendants in the sum of about \$1,000, and that said accounts were adjudged and set off against each other and the difference paid these defendants in cash or notes which were afterward paid by said Biersdorf. That said settlement was made in September, 1884, and that at that time said Biersdorf was indebted to these defendants in the sum of about \$19,000."

The effect of that answer as evidence for the appellants is an important question in this case. The oath of the appellants is an important question in this case. The oath of the appellants to it is, that they have heard it read, and know the contents, "and that the same is true, except as to the matters therein stated on information and belief, and as to those matters, they believe it to be true."

The appellants are three—Joseph, Rudolph and Simon. The appellees put in evidence the answer the three had made as garnishees in another suit against Biersdorf, in which Rudolph and Simon had said that they were not personally

familiar with the matters which form the subject of the interrogatory and answer quoted.

In this case Joseph, as a witness, testified; and without repeating at large his testimony, it is enough to say that while in general terms, he insists that in September, 1884, his firm and Biersdorf had a settlement, in which Biersdorf was found indebted to them several thousand dollars, which he paid, yet as to all details of their dealings, he reiterates, over and over, that without his books he can not tell anything about the matter—that he does not remember—and that most of the books have been destroyed by fires. The bookkeeper of the appellants and his assistant were witnesses, and by their testimony the alleged destruction of the books is disproved; they were preserved in vaults. A ledger only was produced, and in it were two entries, which, if true, would dispose of this case. Biersdorf is charged, 1884, January 29, Reg. 1, 557, \$12,787; February 7, Reg. 1, 571, \$5,502.50.

No other book was produced, and no witness could give any definite account of any transactions to which those charges could relate. It was in evidence that the books from which the ledger entries should have been made, had been mutilated by the appellants. Leaves were taken out, others inserted in their places and colored to correspond with those not removed, and new entries, variant from the original ones, made upon the substituted leaves.

Some of these removed leaves were produced by the bookkeeper, and on one of them, with the date of January 28th, appears what seems to be an order from Biersdorf for 200 pieces of plush at \$1.55 per yard, but no number of yards is shown, or any aggregate amount stated. From such an entry nothing could be posted to the ledger. This record contains no such evidence as would warrant a finding that those plushes had been paid for, if the answer of the appellants is to be treated only as a pleading, and not as evidence. Now as to that answer, it is evasive and not responsive to the interrogatory. It gives no detail as therein called for. 1 Daniell's Chy. Prac. 844, with a great collection of cases in notes.

The form of the oath makes the whole answer on information and belief, as there is no way of distinguishing between the matters so stated and those of which the appellants had knowledge. The affidavits of Rudolph and Simon to their answer as garnishees, and the testimony of Joseph as a witness in this case, show that they had no such knowledge at the time the answer in this case was made, as would be necessary to make the answer evidence even if it had been responsive and positively sworn to. *Fryrear v. Lawrence*, 5 Gilm. 325.

The transactions between the appellants and Biersdorf, whatever they were, occurred from January to September, 1884. They answered as garnishees, in November, 1885. The next month they answered the original bill in this case, and in March, 1886, made the answer now under consideration.

It would seem that they had had sufficient occasion to consider their relations with Biersdorf, to remember all they ever knew about them, and to enable them to state clearly and definitely what they were. Upon the whole matter, the answer is only to be treated as a pleading, setting up affirmative matter of defense, to be proved by the appellants. *Pankey v. Raum*, 51 Ill. 88; *Clements v. Moore*, 6 Wall. (U. S.) 299; *Hart v. Ten Eyck*, 2 Johns. Ch. 62.

Without attempting any summary of the voluminous evidence in this record, it is enough to say that it contains nothing that can be regarded as trustworthy proof of that defense. The case is not like *Gage v. Parmlee*, 87 Ill. 330, where it is held that the destruction of his books by the defendant did not supply the lack of affirmative evidence of the case of the complainant. Here the case is made out on behalf of appellees by showing their judgments and executions, and tracing property of Biersdorf into the possession of the appellants. Why they should not now account for the value of it, is for them to show. The undenied mutilation of their books of original entry is a circumstance so suspicious in itself, that whatever credit might otherwise be attached to the ledger is destroyed.

It may be that both sides of the account between the appellants and Biersdorf were fictitious; there are some

Kuttner v. Haines.

circumstances stated, and allusions made, in the brief of the appellants, which seem to be intended to draw the attention of this court to the interest that one, not a party to this litigation, has in establishing that theory; and it urges that the appellees "can not have a decree unless the evidence warrants it, simply because appellants (in some other direction) may have done wrong."

All this is not very clear, but whatever is meant by it, the admission in the pleadings here by the appellants, that they bought from Biersdorf \$14,700 in value of goods, is conclusive on that fact for the purposes of this case.

The finding in the declaratory part of the decree that the appellants owed to Biersdorf interest on the \$14,700, is immaterial, as the total amount to be paid to all the appellees is less than \$14,700.

When other creditors of Biersdorf apply for relief on that decree, its correctness will be an open question. *Wadhams v. Gay*, 73 Ill. 415.

There is no error, and the decrees are all affirmed.

Decrees affirmed.

KATE T. KUTTNER

v.

CHARLES H. HAINES ET AL.

Landlord and Tenant—Ground Lease—Conditions—Lien for Rent—Homestead—Bill of Review—Practice.

1. A homestead will not attach to a building alone, unaccompanied by any interest in the land.
2. As against the landlord, a tenant has no homestead in premises after a given term expires.
3. In proceedings touching a landlord's lien for ground rent and taxes upon certain buildings conceded to be chattel property, this court holds that the terms of sale thereof were within the discretion of the court, and declines to interfere with the decree.

[Opinion filed February 12, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Mr. RUFUS KING, for appellant.

Mr. S. WHIPPLE GEHR, for appellees.

GARY, P. J. The appellant filed in the Superior Court a bill of review, and obtained an interlocutory injunction, which the court afterward dissolved, and then the complainant asked the court to dismiss her bill if the court was of opinion that it showed no equity, and the court being of that opinion, dismissed it. From that decree this appeal is taken.

It is unnecessary to consider the many points raised by the briefs on the subject of bills of review, as, in this case, the answer to any bill of review of the former decree is, that there is no error in it.

The appellant was the tenant, by ground lease, of the appellee Haines. The leases contained provisions for payment of rent, taxes and assessments by the lessee; that if she did not pay taxes or assessments the lessor might pay them and add them to the rent; that the buildings and improvements should be no part of the realty, but be and remain chattel property; that the rent should be a first lien upon them; and stringent provisions for a sale on default, by giving ten days notice.

The terms expired May 1, 1888. The rent and taxes fell behind in 1886 and 1887, and on the 30th of March, 1888, the appellee Haines filed his bill to foreclose his lien upon the buildings.

Such proceedings were had that after the report of a master as to the amount due, a decree was entered July 6, 1888, for a sale of the buildings, at the court house door, on ten days notice, unless payment was made in two days.

The leases having expired more than two months before that decree was entered, the utmost right the appellant could have had to the buildings was the right, by immediate payment of the claim upon them, to remove them from the premises. Her claim of a homestead is fully answered by *Brown v. Keller*, 32 Ill. 151.

Garrity v. Hamburger Co.

Against the landlord a tenant has no homestead in the premises after the term expires, nor will a homestead attach to a building alone, accompanied by no interest in the land. The terms of the sale were, in the discretion of the court, regulated by no statute, and, in fixing them, it was proper for the court to take into consideration the situation of the parties.

The buildings were upon his property, which she was detaining without right. Until her claims were disposed of he was kept out of the enjoyment of his property, without recompense. She might have prevented the sale by performing the duty she had long neglected. On execution against her at any time during five years next preceding the decree, her interest in the premises might have been sold without redemption on ten days notice. Sec. 3, Chap. 77, R. S.

The buildings were, in their nature, part of the realty, and could not be removed by an officer, and whether they could be sold to better advantage on the premises or at the court house, was a matter of opinion for the court to exercise its judgment upon.

Probably, in the nature of things, it could make no difference, for the situation of the property was such as not to attract competition.

There was no error in dismissing the bill, and the decree is affirmed.

Decree affirmed.

PATRICK L. GARRITY

v.

THE HAMBURGER COMPANY.

35	309
136	490
35	309
55	330
35	309
70	375

Account—Objections—Jury—Right to Trial by—Bill of Exceptions—Practice—Evidence.

1. Whatever ground the party who is called upon to account has, upon which to resist the taking of such account, should be pleaded before the court under Sec. 6 of the act relating to actions of account, and upon an issue formed on such a plea, he is entitled to a trial by jury.

2. Where a party has consented to the taking of an account he can not object to the auditor's examination of witnesses, books and the like, and inquiries made in order to ascertain the state of accounts between the parties involved.

3. If a bill of exceptions does not state that it contains all the evidence in a given case, this court will presume that the decision of the trial court was justified by evidence not shown, if that shown is insufficient to support the same.

4. In the absence of evidence to the contrary, an auditor will be presumed to have been duly sworn.

5. In an action involving the settlement of corporate accounts, this court holds, that the result arrived at was in accordance with the respective rights of the parties to the controversy; that the irregularities in the proceedings were consented to by defendant, and that the judgment against him must be allowed to stand.

[Opinion filed February 12, 1890.]

APPEAL from the Superior Court of Cook County; the
HON. JOHN P. ALTGELD, Judge, presiding.

Messrs. SAWIN & VANDERFLOEG, for appellant.

The plaintiff here is a corporation suing for money alleged to have been paid by it, under false and fraudulent representations, and for money misappropriated by defendant, and not charged on the books. The defendant denies any fraud or misrepresentation or misappropriation, setting up a contract under which he sold the goods, etc., and claiming a salary as an officer of the plaintiff company, authorized and allowed by its by-laws, and drawn by him in accordance with these by-laws from time to time, and paid without question on order of the secretary and treasurer, and regularly charged to his account. The decision of both questions depends upon disputed facts, which should be decided by a jury, and have no relation or analogy to book account or other accounts. Book account "must be a formal statement in detail of the transactions between two parties made contemporaneously with the transaction or immediately after." Walker & Bates' Ohio Digest, Vol. 1, Div. 6; citing Richardson v. Wingate, 10 W. L. J. 145.

An action of account or of book account is not proper, and can not be maintained under such circumstances, since the

whole of plaintiff's cause of action was based upon misrepresentation, misappropriation and fraud. *Spear et al. v. Newell*, 2 Paine, 267 (U. S. Cir. Ct.); *May v. Williams*, 3 V. 239.

If, however, not regarding the action of account at common law, it is contended that a construction of our statute warrants a proceeding, as was had in the case at bar, we insist that it is a direct invasion, and is in derogation of the right every citizen has, to have all questions of fact, in actions at common law, tried by a jury. *Bohmann v. City*, 15 Ill. App. 48; *Robson v. Jones*, 33 Tex. 324. Constitution as above cited. *Ware v. Nottinger*, 35 Ill. 375.

Should it be urged, however, that the order of reference recites that the defendant was willing to account, or stood by and suffered such orders to be made, and by his silence acquiesced therein, we insist that such recital proves nothing, and if it did, such a willingness can not confer jurisdiction not before possessed; and further, that such willingness to account can not be construed as a waiver of trial by jury on the controverted question of fraud, etc., but could extend only to undisputed items, as shown by the proper books of account, or other evidence between them. See *Ware v. Nottinger*, 35 Ill. 375; *Hermann v. Partridge*, 79 Ill. 471.

We contend, first, that the auditor had no authority to act in the matter, because no interlocutory judgment to account upon any verdict or finding of the court legally made, was entered therein; and second, because the auditor was not under oath, in fact, and it does not appear by the record that he was sworn; an auditor being simply a referee. *Spear v. Newell*, 2 Paine, 267, which holds such judgment essential; *Clison v. Means*, 40 Me. 337; *Gregory v. Healy*, 61 Ill. 470; *Crammer v. Malthis*, 2 Penning. 138; *Parker v. Cramner*, 1 Penning. 252.

And we submit further, that if the auditor derived any authority to act in the matter, the manner of his proceeding, and his assumption to pass upon and decide questions of law and disputed facts of fraud, misrepresentation and wrongful conversion of money, is entirely unwarranted in any view of

the case, either under our statute or the common law. See cases cited under first question presented.

Disputed questions of law or of fact, as they arise before an auditor, must be referred to the court; if of law they are to be decided by the judge, and if of fact they are to be passed upon by a jury; nor are formal pleadings required or allowed before an auditor, to present or to preserve them, but they should be by him certified into court. Such is the uniform law of procedure in this action. See cases above cited. *Lee v. Abrams*, 12 Ill. 111.

Whether, however, the issues so formed are to be so referred during the progress of the accounting, or at the coming in of the report, is differently decided, owing to statutory provisions on the subject. But where there are no special statutory provisions, the correct practice seems to require that they should be so referred, as they arise during the account, and hence the unpopularity of this action.

See the whole action detailed at length in *Godfrey v. Saunders*, 3 Wilson, 73, and Freeman's Illinois practice, *supra*. Under the decision of our Supreme Court in *Lee v. Abrams*, 12 Ill. 111, however, it seems that they may be preserved and presented at the time of the coming in of the report, and such is also the practice in some of the other States.

All courts, however, seem to recognize the fact, that litigants can not have disputed questions of fact, especially such as misrepresentation, misappropriation, etc., tried and decided by a referee or auditor where a right of trial by jury is guaranteed. The difference being only as to the time and manner of presenting these issues. There certainly were numerous disputed questions of fact and of law presented before the auditor, and referred by him to be properly tried, but upon which he presumed to rule, and which he actually decided; against the objection of appellant, and to which exception was duly taken and formed part of the record and bill of exceptions in this case. *Rensselaer Glass Factory v. Reid*, 5 Cow. 587.

It was a question of fact whether the goods and merchandise at the branch store on Monroe street, were sold at *cash value*,

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as claimed by appellant and as recited in resolution of purchase, or at *cost* price, as contended by appellee. Cash value as we understand its meaning, is what anything will sell for—it being the purchasing power which an article possesses; while cost price is what a person pays, and is no positive criterion of value, since a thing may be bought dear or cheap. See Bouvier's Law Dictionary.

It is upon the construction and decision of this disputed question that the auditor's first and second findings are made, and declares in terms that there is due appellee on account of misrepresentations made at this sale the sum of \$338. Surely fraud and misrepresentation are not proper or legitimate questions for an auditor to inquire into and decide against the objection of a defendant; nor were they legitimate or relevant inquiries in matters of book account.

Book account is a formal statement in detail of the transactions between parties made contemporaneously with the transaction or immediately thereafter. Walker & Bates' Ohio Digest, Vol. 1, title, Book Account, Div. 6; citing Richardson v. Wingate, 10 W. L. J. 145.

Messrs. GARTSIDE & LEFFINGWELL and DAVID J. WILE, for appellee.

It is urged by the appellant that the court below was without "jurisdiction" in the matter of the reference to an auditor. If jurisdiction be "the power to hear and determine a cause," then the court below was *coram judice* when this case was presented to it, and brought the power into action. Bush v. Hanson, 70 Ill. 480.

It certainly had jurisdiction of the subject-matter of such action, whether in assumpsit or account, and as certainly had jurisdiction of the persons of the litigants. The parties were all in a court possessed of ample powers to adjudicate such cases. Clothed with such powers the court below proceeded in every essential step without objection from appellant. Making no objection, when if tenable at all it should have been made, it is too late for him to make it later.

The rule undoubtedly is that jurisdiction of the subject-matter can not be conferred upon a court by consent of par-

ties, nor can want of it be waived. *Randolph Co. v. Ralls*, 18 Ill. 29.

Appellee's position on this point, succinctly stated, is this:

1. The Superior Court of Cook County has jurisdiction of the common law and statutory action of account. 1 *Starr & Curtis*, 187, Ch. 2, tit. Action of Account.

2. That court in this case had jurisdiction of the persons of the parties litigant.

3. Appellant's failure to object to the jury's discharge, his willingness to account, his failure to object to the reference in form or substance, his omission to object or except to the order changing the form of action to account—amount in law to a waiver of any possible irregularities (by no means by appellee conceded to be such) in the proceedings of the court below. *Randolph Co. v. Ralls*, 18 Ill. 29; *Phillips v. Hood*, 85 Ill. 451; *Birks v. Houston*, 63 Ill. 77; *Allen v. Belcher*, 3 Gilm. 594.

GARY, P. J. The appellee commenced this action in assumpsit, but on the trial before the jury the court, by the consent of both parties, changed it to an action of account, gave the appellee leave to file another account, and referred the cause to an auditor.

This occurred October 18, 1888. October 29th, the parties appeared before the auditor, and the appellant then objected before him to further proceeding.

The next day the appellant moved the court to set aside the order referring the case to an auditor, but took no exception on the denial of his motion. He did not except to leave then given to the appellees to file their declaration *nunc pro tunc*, as of October 18th, but it is immaterial as of what date it is filed, the conduct of the case not being at all affected thereby. The objection that there was no interlocutory judgment to account is without merit, as the appellant had consented, before the case was referred, to account.

The net result of the auditor's examination of the accounts between the parties was a balance against the appellant of \$1,238.29, for which judgment was entered against him. That balance was made up of money which the auditor found that

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the appellant had received, which had not been charged upon the books of the appellees, and of an overcharge which the auditor found that the appellant had made upon goods sold by him to the appellees.

Whether these were proper charges depended upon evidence, and the position of the appellant is that the auditor could not decide upon disputed facts, but could only state an account upon undisputed items; that upon issues of fact, to be settled by evidence, he was entitled to a jury.

It is doubtless the law that whatever ground the party who is called upon to account has upon which to resist the taking of an account at all—as that he never was in such a relation with his adversary as authorizes calling him to account, or that he has been released or discharged from the duty to account by the act of the parties, or operation of law, should be pleaded before the court, under the 6th section of the act in regard to the action of account. Upon an issue formed on such a plea, he is entitled to a trial by jury. But the appellant in this case consented to account, and before the auditor; whatever inquiry was necessary to ascertain the state of accounts between the parties, upon the items properly chargeable to them, respectively, in that relation to each other with reference to which the account was being taken, the auditor had authority to make, either by the examination of witnesses, or books and papers, or both. Sections 9, 10 and 12 of the act; *Lee v. Abrams*, 12 Ill. 111.

This view disposes of a large part of appellant's argument here. The items allowed by the auditor are supported by such evidence as makes his finding, like the verdict of a jury under similar conditions, final.

The real grievances of the appellant are that his claim for a salary at the rate of \$5,000 per year was disallowed, as was also a large sum to his credit upon the books of the appellees when he sold out to Jonas Hamburger.

For an understanding of these matters a statement of facts becomes necessary.

In February, 1884, the appellant, L. M. Hamburger, and Max Hamburger, formed a co-partnership, and the articles

of agreement, which contemplated that it would be turned into a corporation, provided that the appellant might draw out of the business \$5,000 per year, and each of the others \$12,000, but neither should have a salary. In those articles it was agreed that they should be the basis of the by-laws of the corporation when formed.

The corporation was afterward formed; and the appellant put in evidence one, and only one, by-law. L. M. Hamburger had gone out of the business. This by-law referring to Max Hamburger and the appellant was: "Said Hamburger and Garrity may draw and receive from said company, as follows:" Then followed Garrity \$5,000, and Hamburger \$ 2,000 per year. On this he claims that \$5,000 per year was his salary as president of the company. It is not necessary to consider how this claim would stand if it affirmatively appeared that there was no other by-law relating to the matter. The record shows that the appellees put in evidence six other by-laws, but they are not copied.

It has always been the law of this State, that if a bill of exceptions did not state that it contained all the evidence, a court of review would presume that the decision of the lower court, which could be, was justified by evidence not shown, if that shown was not sufficient. *Rogers v. Hall*, 3 Scam. 5.

It is very probable that some one of the omitted by-laws, in pursuance of the provisions of the partnership agreement, negatives the claim for salary.

On the 19th of February, 1886, the appellant sold his interest, as shown by an instrument, as follows:

"In consideration of the sum of twenty-five hundred dollars (\$2,500) cash in hand, paid me by Jonas Hamburger, and other good and valuable considerations, the receipt of which is hereby acknowledged, I do hereby sell, assign, transfer and set over to the said Jonas Hamburger all my right, title and interest of whatsoever kind or character in and to the corporation known as the Hamburger Bros. Co., and the Hamburger Garrity Co., and the business thereof. In witness thereof I have hereunto set my hand and seal, this 19th day of February, 1886.

"P. L. GARRITY. [SEAL]"

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And took a bond of indemnity as follows:

"In consideration of the purchase this day made by Jonas Hamburger of all the interest rights of Patrick L. Garrity in and to the corporation and business of the Hamburger Bros. Co. and the Hamburger & Garrity Company, and of one dollar and other good and valuable considerations to us paid by the said Patrick L. Garrity, the receipt of which is hereby acknowledged, we, the undersigned, do hereby jointly and severally promise to pay and discharge the obligations of the said Patrick L. Garrity now existing and represented as follows, to wit: The note executed by the Hamburger Bros. Co. to Minnie E. Hamburger, upon which suit is now pending in the Superior Court, Cook County, and the subsequent guarantee of the said note by the said Garrity, and notes executed by the said Garrity and Max Hamburger, payable to the order of L. M. Hamburger, the notes executed by the said Hamburger & Garrity Co. to the First National Bank of Chicago, and indorsed by the said Garrity and Max Hamburger, and a judgment against the said Hamburger Bros. in favor of Fernandez and others, heretofore obtained in the Superior Court of Cook County; and we further promise and agree and guarantee to prosecute and defend all law suits and litigations of every character that may arise from or from out of this indebtedness and obligation at our expense, and to save and keep harmless the said Patrick L. Garrity, his heirs and assigns, from all loss, liability or expense by reason thereof, or any or either thereof. The foregoing shall be binding upon our heirs, administrators or assigns.

"In witness whereof, we have hereunto set our names and seals this 19th day of February, 1886.

"JONAS HAMBURGER, [SEAL.]

"MAX HAMBURGER, [SEAL.]"

The record does not show that any certificates of stock in either of the corporations mentioned had ever issued; the interests of the parties were determined by the books. There is testimony that the appellant, in the negotiations preliminary to the sale, looked at his account on the books, and said that if he should retire from the concern entirely, and sell out his

good will, and all his interest of every description, stock and everything, he wanted \$8,000, or \$4,000 more than was coming to him. In fact he did get \$8,000, although the bill of sale recites only \$2,500.

At that time there was to his credit on the books a trifle over \$4,000. In the account, of which that was the balance in his favor, he had been charged with \$4,000 which had been borrowed from the First National Bank on a note to the bank mentioned in the bond of indemnity, which money had been put to the credit of the appellee, and by it checked out as a loan to appellant. After the sale, the appellant paid to the appellees the interest on that loan from December 1, 1885, to February 20, 1886, that interest not having been charged to him. It is now claimed by the appellant that Jonas Hamburger was bound by the terms of the bond of indemnity to pay that note, and by his so doing, the charge of the \$4,000 to the appellant on the books of the appellee would no longer be a proper charge, but should go to his credit in the account taken by the auditor.

It is clear that the sale by the appellant to Jonas Hamburger was of all the beneficial interest the appellant had in anything concerning the appellees, and that the bond of indemnity was not intended to affect the relations between Jonas Hamburger and the appellees, but to save the appellant harmless from future claims. The record does not show, nor is there any presumption, that the auditor was not sworn, and the objection of the appellant on that point has nothing to stand upon. The result seems to have been in accordance with the respective rights of the parties, and the irregularities in the proceedings consented to by the appellant, and the judgment is therefore affirmed.

Judgment affirmed.

JOSEPHINE P. WALDRON, ADMINISTRATRIX, AND EDWIN
WALKER, ADMINISTRATOR,

v.

SEROTIA A. ALEXANDER.

35 319
136 550

*Administration—Services Rendered at Request of Deceased—Claim for
—Limitations.*

Upon a claim filed against the estate of a deceased person, the same being based upon services rendered parents of the deceased at his request and upon his promise to pay therefor, this court holds that the statute of limitations did not apply to such portion of said claim as accrued more than five years before the filing thereof, for the reason that the evidence shows that it was the intention of the parties that deceased should be the depository of the earnings of the claimant, and that calls for payment were to be made to suit her convenience, and declines to interfere with the judgment in her behalf.

[Opinion filed February 12, 1890.]

APPEAL from the Superior Court of Cook County; the
HON. RICHARD W. CLIFFORD, Judge, presiding.

Mr. A. J. EDDY, for appellants.

Counsel for appellee contend that the several payments made took the claim out of the operation of the statute, and that the promise to settle and pay the claimant was sufficient to remove the bar thereof.

Any acknowledgment, either by way of part payment or by way of new promise, to remove the bar of the statute must be an acknowledgment of or a part payment upon a particular debt or account; there must be no uncertainty as to the debt referred to, and while the debt may be made up of several items or of several things, the record must show conclusively that when the debtor made his acknowledgment or part payment, he had in mind the specific debt or account supposed to be revived. *Barnard v. Bartholomew*, 22 Pick. 291; *Davis v. Steiner*, 14 Pa. St. 275; *Martin v. Broach*, 6 Ga. 21; *Robbins v. Farley*, 2 Strobb. (S. C.) 348; *Conway v.*

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Rayburn, 22 Ark. 290; Lockhart v. Eaves, Dudley (S. C.) 321; Buckingham v. Smith, 23 Conn. 453; Hale v. Hale, 4 Humph. (Tenn.) 183.

In *Ditch, Adm'r, v. Vollhardt*, 82 Ill. 134, there was no uncertainty whatsoever as to the debt referred to, as it was a claim for wheat sold. And speaking of the amount in controversy, the court says, on page 136:

"Here the amount was fixed, certain and agreed upon between the parties, and the case falls clearly within the provisions of the statute. There was, therefore, no error in allowing six per cent interest."

Schmidt v. Pfau, 114 Ill. 494, was an action for services claimed to have been rendered by Pfau to the defendant. Plea of general issue and statute of limitations.

How far this case is from being parallel to the one at bar is plain from the language of the court on page 503, where it says:

"It was a conceded fact that appellee worked for the company for three years, and that there had been no settlement or attempt at settlement between the parties on account of his services until he stopped work altogether on the 25th of February, 1880, and appellant himself swears that it was the original agreement to pay appellee \$300 a year. Assuming this to be true, there was no ground whatever for interposing the statute of limitations, for the five years did not commence running as to the first year's service until the 25th of February, 1878, and the suit was commenced on the 21st day of February, 1883."

An acknowledgment to remove the bar of the statute may be:

a. By acknowledgment or promise sufficient to revive the debt.

b. By part payment, which operates as an acknowledgment of debt and promise to pay it.

In both cases certain requisites are absolutely essential to make the acknowledgment effectual.

1. A mere general admission of indebtedness is insufficient. *Shitler v. Bremer*, 23 Penn. St. 413; *Pray v. Garcelon*, 17 Me. 145.

2. The acknowledgment must be shown to relate to the particular demand in question. *Buckingham v. Smith*, 23 Conn. 453; *Smith v. Moulton*, 12 Minn. 352; *Walker v. Griggs*, 32 Ga. 119; *Baxley v. Gayle*, 19 Ala. 151; and cases above cited.

3. A promise to settle is insufficient. *Bell v. Crawford*, 8 Gratt. (Va.) 110; *Leigh v. Linthicum*, 30 Texas, 100; *Spong v. Wright*, 9 M. & W. 629; *McClelland v. West*, 59 Pa. St. 487; *Marqueze v. Bloom*, 22 La. An. 328; *Brayton v. Rockwell*, 41 Vt. 621; *Currier v. Lockwood*, 40 Conn. 349; *Weaver v. Weaver*, 54 Pa. St. 152; *Goove v. Chamberlain* (Va.), 5 S. E. Rep. 174; *Shaeffer v. Hoffman*, 113 Pa. St. 1; *Bloomfield v. Bloomfield*, 7 Ill. App. 261.

4. "There must not be any uncertainty as to the particular debt to which the admission applies." *Wood on Limitations*, page 151; *Eckford v. Evans*, 56 Miss. 18; *Landis v. Roth*, 109 Pa. St. 621.

5. The acknowledgment "must be shown unmistakably to relate to the particular debt or demand which is sought to be revived by it, or the acknowledgment must be attended by circumstances which will enable a jury to ascertain definitely what debt was intended." *Wood on Limitations*, page 155, and cases cited; *Hussey v. Kirkman*, 95 N. C. 63.

6. The expression of a wish to pay a debt, as "Please send me the amount due. Want to arrange and pay it off," not sufficient. *Johnson v. Johnson*, 5 S. E. Rep. (Ga.) 629.

7. Where a part of the indebtedness is barred by the statute and a part not, "a general acknowledgment will not remove the bar, because it may have been intended simply to apply to the indebtedness to clear the statute." *Wood on Limitations*, 170, 171; *Morgan v. Walton*, 4 Pa. St. 321; *Suter v. Shuler*, 22 Pa. St. 308; *Weisner v. Stein*, 97 Pa. St. 322; *Burn v. Boulton*, 2 C. B. 476; *Milles v. Fowkes*, 5 Bing. N. C. 455; *Gartrell v. Linn*, 4 S. E. Rep. (Ga.) 918.

8. "In order to make a money payment a part payment within the statute, it must be shown to be a payment of a portion of an admitted debt, and paid to and accepted by the creditor as such, accompanied by circumstances amounting to

an absolute and unqualified acknowledgment of more being due, from which a promise may be inferred to pay the remainder." Wood on Limitations, 221, 222; Tippetts v. Heane, 1 C. M. & R. 252; Smith v. Simms, 9 Ga. 418.

9. "If there is a mere naked payment of money without anything to show on what account or for what reason the money was paid, the payment will be of no avail under the statute. If the party merely says, 'place the money to my account,' without specifying any amount or any debt, and the creditor appropriates the payment in part liquidation of the debt barred by the statute, without the privity or assent of the debtor, this will be of no avail as an acknowledgment of the debt by the debtor." Wood, Limitations, 225.

10. "If there is a disputed and an undisputed debt, or if there are two debts—one barred by the statute and the other not barred—a general payment on account will be of no avail at common law under the statute, because it is left uncertain to which debt the payment was intended to be applied." Wood, Limitations, 225; Burn v. Boulton, 2 C. B. 476; Milles v. Fowkes, 5 Bing. N. C. 455.

11. And "the burden of establishing a part payment sufficient as to time and other circumstances to remove the statute bar is upon the plaintiff." Wood, Limitations, 225, 226.

Messrs. CRATTY BROS. & ASHCRAFT, for appellee.

The statute of limitations would not begin to run until demand made, and the claim is a running account and therefore not barred. Payne v. Gardiner, 29 N. Y. 146; Catling v. Schooling, 6 T. R. 189; Prachy in re Seaber, 1 Deacon, 551; Van Swearingen v. Harris, 1 W. & S. (Pa.) 356; Coster v. Murray, 5 Johns. Ch. 522; Union Bank v. Knapp, 3 Pick. 96; Tucker v. Ives, 6 Cow. 193; Bass v. Bass, 6 Pick. 362; McClelland v. Crafton, 6 Me. 308; Barnard v. Bartholomew, 22 Pick. 291; Nesom v. D'Armond, 13 La. 294; Dyer v. Walker, 54 Me. 18; Sibley v. Lombert, 30 Me. 253; Baker v. Joseph, 16 Cal. 173.

The several payments made took the claim out of the

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operation of the statute. *Barnard v. Bartholomew*, 22 Pick. 291; *Taylor v. Frost*, 132 Mass. 30; *Walker v. Butler*, 6 El. & Bl. 506; *Nesom v. D'Armond*, 13 La. 294; *Dyer v. Walker*, 54 Me. 18; *Sibley v. Lombert*, 30 Me. 253.

The promise to settle and pay the claimant was sufficient to remove the bar of the statute. *Hazlebacker v. Reeves*, 12 Pa. St. 264; *Davis v. Steiner*, 14 Pa. St. 275; *Moore v. Hyman*, 13 Red. (N. C.) L. 272; *Hart v. Boyd*, 54 Miss. 547; *Martin v. Broach*, 6 Ga. 21; *Arcy v. Stephenson*, 11 Red. (N. C.) L. 36; *Robbins v. Farley*, 2 Strobbh. (S. C.) 348; *Conway v. Rayburn*, 22 Ark. 290; *Lockhart v. Eaves*, *Dudley*, (S. C.) 321; *Buckingham v. Smith*, 23 Conn. 453; *Whitney v. Bigelow*, 4 Pick. 110; *Minkler v. Minkler*, 16 Ver. 193; *Lord v. Harvey*, 3 Conn. 370; *Barnard v. Bartholomew*, 22 Pick. 291; *Thompson v. French*, 10 Yerg. (Tenn.) 453; *Hale v. Hale*, 4 Humph. (Tenn.) 183; *Kittredge v. Brown*, 9 N. H. 377; *Hart v. Boyd*, 54 Miss. 547; *Ditch, Adm'r, v. Vollhardt*, 82 Ill. 134; *Schmidt v. Pfau*, 114 Ill. 494.

GARNETT, J. *Elijah S. Alexander* died intestate in Chicago in February, 1886. Appellants were appointed administrators of his estate by the Probate Court of Cook County. In April, 1887, appellee filed in that court a claim against the estate for eighteen years' service in nursing and caring for the parents of the deceased, residing at Brattleboro, Vermont, under a contract with deceased, the amount of the claim being \$18,000 and \$12,299 interest thereon. Another item of \$10,000 was included in the claim, but as it was withdrawn by *remittitur*, it is of no importance in the case. The claim was allowed to the extent of \$9,500 by the Probate Court, and the claimant appealed to the Circuit Court, where there was a trial before a jury, a verdict being rendered for the claimant in the sum of \$41,800, which included the \$10,000 item and \$4,953 interest thereon. A *remittitur* of \$14,953 being entered, appellant's motion for a new trial was overruled and judgment entered for \$26,847, which appellants pray may be reversed.

Appellee was a sister of the deceased. She was born about

1833, and educated as a music teacher. About the year 1857 she was engaged in teaching music in a college in Virginia, but returned to the home of her parents in Brattleboro, at the breaking out of the war of the Rebellion. Soon after that she was employed in her profession in Boston, but returned to her parents in Brattleboro, in June, 1867, on account of a severe illness of her mother. Her father was then about sixty years of age and her mother sixty-six years. The latter was in very poor health, and in fact had not enjoyed good health after she was married. Elijah S. Alexander was a resident of Chicago, where he had been successfully engaged in business for some time prior to 1867. In the summer of 1867 he visited his parents at their home, and became impressed with the fact that they needed some one to look after their comfort and take charge of their household affairs. He then told his sister, Serotia, that she must give up teaching and stay at home to take care of their father and mother. She objected to doing so, saying that she enjoyed her profession, that she had \$1,000 a year salary and her board, when she was South, was then doing still better, and that he could not afford to pay her. He told her that it made no difference what she could earn at her profession, that he would pay her more than she could earn, and that he wanted to feel easy in his mind about his father and mother. Before he left for his home that summer, appellee agreed with him that she would stay with their father and mother upon the terms he had proposed and she did remain there, faithfully performing the duties thus undertaken until her brother's death in February, 1886. During those eighteen years he generally visited his parents once a year, though sometimes he would be absent for two years. At the time of these visits he paid his sister small sums of money, varying from \$20 to \$100, and was in the habit of saying to her, "Pass this to my credit and it will keep our contract alive." On one occasion soon after the contract was made he asked her how much money she wanted, and she told him that she had little use for money, that she did not go anywhere, had no chance to spend money, and that she preferred to have him keep the

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money in his hands, as she would have to invest it somewhere, and she felt safer to have it with him than anywhere else. He assented to the suggestion and agreed to pay her interest. At one time something was said about his giving her his note, but he said there was no necessity for it, that the account was just as good as long as he kept it alive, and if she gave him credit it would be just as well as it would be to have a note.

The last payment he made to her in April, 1885, when he handed her \$20 and said, "I would give you more now, but I have just money enough left to take me back to New York."

Proof of these facts, it is true, comes from appellee's father, mother, and her brother Charles, but they are corroborated as to the fact of the contract by several disinterested witnesses.

The statute of limitations was pleaded by appellants to all of the claims that accrued more than five years before the filing of the claim in the Probate Court. No claim is made in behalf of appellee that any written evidence of the contract ever existed. So the question whether the claim is of a character to which the statute of limitations applies may be regarded as the main point at issue. The statute is for "the benefit and repose of individuals, and not to secure general objects of policy or morals. Its protection may, therefore, be waived by those who assent in legal form, and when acted upon, such waiver becomes an estoppel to plead the statute." See *Quick v. Corlies*, 39 N. J. L. 11, where it was held that the statute was not a good defense to a note in which it was agreed that the note "is not to outlaw by the statute of limitations."

In another class of cases it is implied from the purpose of the contract that the promise is continuing, and although the promisee may, at his pleasure, demand performance of the promisor, yet he is not bound to do so, and the statute does not begin to run until demand and refusal. Bank notes payable on demand are of that character, suit thereon being maintainable at any time within the period fixed by the statute after demand made. *F. & M. Bank of Memphis v. White*, 2 Sneed, 482; *Thurston v. Wolfborough Bank*, 18 N.

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H. 391; Morse on Banks & Banking, 466. The same is true of general bank deposits. *Brahm'v. Adkins*, 77 Ill. 263.

In *Payne v. Gardner*, 29 N. Y. 146, the suit was on the following instrument:

"\$1,000.

NEW YORK, 9th May, 1848.

"Received from Cap. William H. Payne, one thousand dollars, which is to his credit on our books, at six per cent interest.

"SLATE, GARDINER & HOWELL."

The court held that the paper did not, by itself, show conclusively whether the transaction was a loan or a deposit, but that the *intention* of the parties was to govern. From a consideration of the attending circumstances, the court reached the conclusion that it was the intention to make a deposit of the money, and the defense of the statute of limitations was overruled on the ground that there was no right of action against the depositaries until actual demand made, at which time, and not before, the statute began to run.

In *Boughton v. Flint*, 74 N. Y. 476, the widow of David Flint sought to recover of his estate the sum of \$800 and interest thereon from April 15, 1859. This sum was the proceeds of notes and a bond and mortgage, which had been taken for the purchase money on a sale of real estate belonging to her. All the money secured by these different instruments had been collected by the husband in his lifetime, and he recognized the right of his wife to the fund. After it had been received by him he offered to pay it over to her, and she requested him to keep it for her until she should call for it, to which he consented. For the estate it was insisted that the claim was barred by the statute of limitations, but the court held that as there was no evidence that the money had ever been demanded of the husband, or that he had refused to pay it, or laid any claim to it hostile to his wife, the statute was not a bar.

Authority more nearly in point is found in *Stanton v. Est. of Stanton*, 37 Vt. 411, where the claim was on this instrument:

"\$400. For value received I promise to pay E. G. Stanton,

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four hundred dollars in produce or wood from the farm on demand as I may want to use the same, on interest.

“Painsville, July 27th, 1850.

“H. STANTON.”

The court, after stating that the use of “I” instead of “he” was a clerical mistake, held that the statute of limitations did not apply for the reason that “when the instrument itself indicates that the calls for payments were to be indefinitely prospective, and to be made as might suit the wants and convenience of the payee, there is no ground furnished upon which the law can assume any fixed point, as a limit to reasonable time for making a demand, and therefrom give operation to the statute of limitations.” See also *Smith v. Town of Franklin*, 17 Atl. Rep. 838; *Robertson v. Cates*, 12 S. W. Rep. 54.

The facts in the case at bar show that the parties to the contract intended Elijah should be the depository of the earnings of his sister, and that she should have such sums, from time to time, as might suit her wants and convenience. She could not sue without first making a demand. Why any principle should apply here, different from that which governs in ordinary cases of bank deposits, is not easily discernible. We think the question is controlled by the authorities above cited.

Appellants complain that evidence was improperly admitted as to the qualifications of appellee as a music teacher, the value of her services as such, and generally the value of the services of competent music teachers. If there was any force in the objection it disappears when we consider the fact that the amount allowed by the jury was the least sum that could have been given under the clearly competent evidence in the case, no contradictory evidence of value having been offered.

The judgment is affirmed.

Judgment affirmed.

JOSEPHINE P. WALDRON, ADMINISTRATRIX, AND EDWIN
WALKER, ADMINISTRATOR,
v.
CHARLES E. ALEXANDER.

Administration—Services Rendered at Request of Deceased—Claim for.

This court declines to interfere with a judgment for the plaintiff, upon a claim filed against the estate of a deceased person, the same being based upon services rendered in the care of a third person at the latter's request and upon his promise to pay therefor.

[Opinion filed February 12, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon.
RICHARD W. CLIFFORD, Judge, presiding.

Mr. A. J. EDDY, for appellants.

Messrs. CRATTY BROS. & ASHCRAFT, for appellee.

GARNETT, J. This is an appeal from a judgment in appellee's favor on a claim presented by him against the estate of his brother, Elijah S. Alexander. The Probate Court allowed the claim for \$1,792. From that order the claimant appealed to the Circuit Court, where the cause was tried by the court without a jury, and judgment rendered for \$2,400. From the undisputed evidence in the case it appears that in 1884, Henry Alexander, a brother of appellee and of Elijah S., was seriously ill at his father's house in Brattleboro, Vermont; that Elijah, then being on a visit to his parents, induced appellee to abandon a business enterprise he had in view, for the purpose of remaining at home and taking care of Henry, Elijah promising to pay him for his services and for all expenses incurred by him. His instructions to Charles were to give Henry every comfort, to do everything that could possibly be done for him, and he would pay all expenses. After an illness lasting 410 days, during which Henry was entirely helpless, confined to his bed, and in constant need of

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attendance, he died, in August, 1885. At the request of Elijah, and on his promise of payment, the expenses of the funeral, and the last payment on the burial lot, were paid by Charles. During the 410 days and nights of illness, Charles was either personally at his brother's bedside, or procured the attendance of nurses and watchers. He also employed physicians, and paid all the bills for medical attendance, nursing and medicine.

There is no reason to doubt that appellee did pay those items as well as the funeral expenses, and \$300 on the burial lot, making a total of \$1,596.10. Interest added to that amount, from the death of Henry, to the date of the judgment in the Circuit Court is \$364.42, leaving only \$439.48 out of the \$2,400, as compensation to Charles. It is not denied that Charles paid to others \$639.50 for nursing and help for his brother. That is all he claimed on that account, and it is not contended that the amount so paid was unreasonably large. In the \$639.50 is included the wages of a servant in the house, whose help was necessary to enable other members of the family to assist in ministering to Henry's necessities. The evidence is, that the services of a professional nurse were worth \$2 per day and \$2 per night, so that such services were worth \$1,640. Deducting from that amount the \$639.50 actually paid for nursing and help, and we have \$1,000.50 left, which is the least sum that should have been allowed appellee for his own time and labor, if he was entitled to as much as a professional nurse. The witnesses testified that he was faithful in his attendance on Henry at all times, when there was no nurse at the house, and there is no proof to the contrary.

But we have seen the court only allowed him, by the most liberal calculation, the sum of \$439.48 as compensation for his own services. In view of this fact the incompetent evidence, which placed the value of Charles' services at \$1,500 to \$2,000, manifestly had no weight with the court, and its reception was harmless error.

We think the judgment was without material error and it is affirmed.

Judgment affirmed.

ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY

v.

HENRY LENZ AND PAULINE LENZ.

Railroads—Viaduct—Tracks—Injury to Private Property—Ordinances—Liability of Second Company—Damages—Evidence—Instruction.

In an action brought to recover from a railroad company damages alleged to have been sustained by plaintiffs, by depreciating the market value of certain lots owned by them, by means of the erection of a viaduct and the laying of certain tracks, this court holds, in view of the evidence, and of the fact that the verdict for plaintiffs did not show what portion of the damages assessed were based upon injuries arising from the laying of tracks, and of a misleading instruction touching the measure of damages, given in behalf of the plaintiffs, that the verdict in their favor can not stand.

[Opinion filed February 12, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. WILLIAMS, HOLT & WHEELER, for appellant.

Messrs. FURTHMANN & FITCH and WALKER & JUDD, for appellees.

MORAN, J. This action was brought to recover damages alleged to have been sustained by appellees, by depreciating the market value of certain lots owned by them, by means of the erection of the viaduct on 18th street over the tracks of appellant, and those of the Alton and the Western Indiana railroads, and by reason of laying certain railroad tracks by appellant across 18th street and in Blackwell street. The trial before a jury resulted in a verdict against appellant for \$10,000, and to reverse the judgment entered thereon this appeal is prosecuted.

The main question presented by the record, and the one which we deem controlling, for the purpose of this review, is whether, under the facts, the appellant is chargeable with any liability for damage to appellee's property, caused by the building of the 18th street viaduct.

It is not contended by appellees that the viaduct or any part thereof was actually built by appellant, but it is claimed that a certain portion of the cost of the erection was paid by it, and that said fact, considered in connection with certain contracts made and ordinances passed by the city and accepted by appellant, were sufficient to charge appellant with liability for damage to property, resulting from the erection of the viaduct in the manner in which it was erected. The ordinances and contracts showing appellant's relation to the erection of said viaduct are in substance as follows :

On September 15, 1879, the city passed an ordinance permitting the Chicago & Western Indiana Railroad Company to enter the city, cross intervening streets, etc., "upon express condition that said company erect and maintain viaducts over such tracks or streets as the city council may require, and construct approaches to the viaducts, under the supervision of the department of public works, or other proper authority."

The company was required to indemnify the city against all damages, judgments, etc., which may be recovered against it by reason of the privileges or authority granted.

In March, 1881, an ordinance was passed authorizing said Western Indiana Company to erect a viaduct at the east end of 18th street bridge; "work to be according to plans and specifications of the Department of Public Works, and to be under the superintendence and direction, and to the satisfaction of the Commissioners of Public Works of said city," and viaduct to be maintained at the expense of the said company and city to be indemnified against damages resulting from exercise by the company of the privileges granted. On June 30, 1887, an order of the city council directed the commissioners of public works to notify the said railroad to erect and complete for public use a viaduct over the tracks and grounds of said company on 18th street, with necessary approaches, etc..

said work to be completed by said company at such time during that year as the commissioners should indicate.

On August 10, 1887, a contract was made between the Western Indiana Company and the city of Chicago, which recites the obligation of the said company as to the erection and maintenance of viaduct approaches, etc., at 18th street, under plans of the department of public works; that city is to build another bridge at 18th street; that the viaduct shall be constructed as indicated, upon plans attached and work done under control of department of public works; that contracts for said work shall be let by said department of public works, the company having first approved the same by indorsement; that company shall pay as its proportion of the costs one-sixth of the cost of the center pier of swing bridge, the entire cost of the work east of the east pier of bridge, viaduct piers, etc., and all other expenses connected with said construction to the end of said approach at the west curb line of Wentworth avenue, except so much as is to be paid by the Alton R. R. Co. The Western Indiana Company agrees to save the city harmless from any and all damages which may be recovered against it for damages to lots, lands or buildings resulting from the construction of said viaduct, piers, and the approaches thereto which lie east of the bridge.

On said August 10th, after the making of said last mentioned contract, the appellant entered into a contract with the Western Indiana Company which recites the said contract with the city, by which, among other things, the said C. & W. I. R. R. Co. has agreed to pay for the construction and maintenance of that portion of said viaduct extending east from the center of the first pier for said viaduct on the east side of Grove street about 138 feet east therefrom, "and that said last named portion of said viaduct is so constructed especially for the benefit and advantage of" appellant as collateral to and in extension of the contract of lease between the Western Indiana Company and appellant; therefore appellant agrees to pay from time to time to said Western Indiana Company the entire expense of construction and maintenance of "one-half of the pier made to support said viaduct on the easterly side

of Grove street, and one-half of the abutment supporting the approach to said viaduct, which is about 138 feet east thereof, and the entire cost of the superstructure of said viaduct between said pier and abutment," and the contract goes on to specify the time and manner of payment. It appears from the evidence introduced by appellee that the plans for the building of the viaduct were completed and on file in the office of the city engineer in the fall of 1886; that some changes were made therein before the construction, but no alteration in the steepness of grade and no change from Wentworth avenue as a starting point, and it is also shown by appellee, and is without contradiction, that the work was in fact done by the city under the direction of the city engineer and in pursuance of the contract between the city and the Western Indiana Company, the material portion of which we have heretofore stated. There is no evidence in the case tending to show that the construction of the viaduct from the east side of Grove street to the east side of Blackwell street in the manner desired by appellant, extended the starting point of the viaduct to Wentworth avenue, or in any degree increased the injurious effect of the viaduct upon appellees' property beyond what it would have been if it had not been constructed between such points in such manner as to allow the land between these points to be used for appellant's tracks. The claim is purely and simply that because such portion of the viaduct was constructed in the manner in which appellant desired, and because, in consideration thereof, it agreed to pay a part of the cost of the construction between those two points, it has become liable for the damage done to appellees' property, situated a block east, though the viaduct would have had the same relation to, and effect upon, appellees' property if it had been built in some other manner between the east side of Grove street and the east side of Blackwell street, than the manner in which, at appellant's request, it was constructed.

There being no other evidence in the case showing the relation of appellant to the construction of this viaduct, than that contained in the written contracts and the ordinances, nothing to charge it with any liability except the fact that it

agreed to contribute part of the expense of construction in consideration that a portion of the viaduct should be built in a particular manner for its accommodation, the case came within the decision of the Supreme Court in *The Culbertson & Blair Packing and Provision Company v. City of Chicago et al.*, 111 Ill. 651, and the court should have told the jury that, under the facts here shown, appellant could not be held for damage to appellees' property arising from the erection of the viaduct as it was in substance requested to do in defendant's first instruction, and should not have assumed, as it did in plaintiffs' first and second instructions, that appellant did build the viaduct, and direct the jury that if the building thereof caused damage to plaintiffs' property they might find appellant guilty.

We have considered appellees' contention, that by the ordinance for the admission of appellant company into the city, which was accepted, appellant became liable to property owners injured by the erection of this 18th street viaduct. We do not think that a fair construction of said ordinance gives any support to appellees' claim. Besides the damage claimed to accrue to appellees' property from the building of the viaduct, it was claimed that it was also injured by reason of the fact that appellant had laid certain tracks in Blackwell street and across 18th street. The proof was that appellant had laid several tracks on land lying between Blackwell and Grove streets, which land belonged to the company, which tracks crossed 18th street; also that it has laid tracks in Blackwell street, which cross 18th street too, and also that it built a round-house and laid tracks on property which it owned, just north of 18th street. Appellees' property which was alleged to be damaged, was situated on corner of Wentworth avenue and 18th street, and there was practical unity among the witnesses who testified as to the amount of damage, that it was in part due to the construction of the viaduct, in part to a break or disconnection in the sidewalk at or near the west line of appellees' property, in part to the construction of railroads in the neighborhood and the use of surrounding property and the occupation of the streets

for railroad purposes, and there was no attempt on the part of the witnesses to separate and distinguish the damage arising from these different causes.

It is of course clear that any depreciation of appellees' property caused by appellant's laying railroad tracks on its own land, did not constitute an element of legal damage which appellees were entitled to recover. Assuming (what we do not now decide) that appellees would recover, under the facts as shown in this case, from appellant, such damage as resulted from appellant's building tracks in Blackwell street and across 18th street, appellees have entirely failed to show what that damage is, and the verdict must be assumed to be based on the evidence introduced to show the damage, and therefore to be made up of allowances for injuries for which there was no legal right of recovery. The evidence from which the jury were required to find, being as stated, correct instructions could not have aided the verdict, but the instructions given did not distinctly require the jury to disregard improper elements of damage, but were so drawn as to in fact permit the inclusion of such elements. Plaintiffs' second instruction told the jury that if defendant "did, by the building of railroad tracks and by the building of a viaduct in a public street across railroad tracks" damage plaintiffs' property, then plaintiffs could recover whatever damages they have sustained by reason of the building of such railroad tracks and such viaduct by defendant. While a careful reading of said instruction, such as a lawyer would give it, may confine the damage for tracks to those laid in a public street, yet it is so couched as to make it almost certain that a jury would not so understand it, particularly when the proof before them did not distinguish between damages arising from such tracks and others which appellant laid, and which were shown to have depreciated appellees' property.

The judgment must be reversed and the case remanded.

Reversed and remanded.

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MANHATTAN BRASS COMPANY

V.

BENJAMIN C. ALLIN ET AL.

Limited Partnerships—Liability as General Partners—Certificate.

1. The statute authorizing limited partnerships must be substantially complied with, or those who associate under it will be liable as general partners, and notice to creditors that the debtors only expected or intended to be liable as special partners, will not restrict their liability.

2. The contribution of "a specific amount of capital in cash, or other property at cash value," is not fulfilled by postponing the payment of the indebtedness to the special partners due from a preceding insolvent firm, until the new one shall have paid the other creditors of the old one.

3. In the case presented, this court holds that the defendants were liable as general partners, and that the judgment against the plaintiff can not stand.

[Opinion filed February 12, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. FREDERIC ULLMANN, for appellant.

Allin, the general partner, makes oath that the amounts specified in the certificate to have been contributed by the special partners to the common stock were paid at cash value "in goods, wares and merchandise, and by cancellation of indebtedness for money borrowed from each of said special partners."

This is not the affidavit required, and the special partners would have been liable as general partners, even without the express provision to that effect contained in the statute.

In *Van Ingen v. Whitman*, 62 N. Y. 519, the court say with reference to the statute of New York:

"The amount contributed by the special partner is an essential part of the terms of the partnership. The mode of contribution is just as explicitly fixed as that there shall be a

contribution; and it is just as explicitly required that the mode of contribution prescribed by the statute shall be followed and shall be averred in the affidavit, as that there shall be an amount of contribution, and that the true amount shall be stated. To guard against unsafe practices, and to secure the public against even innocent deception, or mistake, the statute demands that a limited partner shall pay into the capital a sum which he shall specify; that he shall make actual 'cash payment' of that sum; that there shall be an affidavit of a general partner that such specific sum has been 'actually and in good faith paid in cash;' and that notice shall be advertised of that sum and of its payment. Certainly the statute meant cash, which is money in hand, and not credits of the special partner or other person, however available, nor real estate, however valuable, nor merchandise, however salable. It was not meant to permit something supposed to be equivalent to money to be put in as capital, and so the door be opened for dispute and inquiry as to the real value of such a substitute, with oftentimes doubtful and unsatisfactory results. The purpose was that the limited partnership should start in its business on a fixed and certain basis, with a sum in its possession of that which does command the markets, and makes the possessor of it equal as a buyer to any other, and to its extent as solvent as any other. It is not a substantial compliance with the statute to substitute for that some other thing, however convertible at the time, but which must be under the hazards and fluctuations of business, as to its readiness of convertibility and amount of production. Nor need there be an intentional false statement to bring the parties within the prehension of the statute. The object of the statute is, by the payment into the capital of a specified sum in cash, to give reasonable security to the portion of the public likely to deal with the partnership, and to insure the payment of that sum; thus it requires the affidavit that the payment thereof has been thus made before the partnership can start as a limited one."

This case was approved in *Pfirman v. Henkel*, 1 Ill. App. 145, where the Appellate Court held the general doctrine,

that it is the plain duty of the special partners to see that the requirements of the statute are complied with, and until they are complied with the partnership is a general one. To the same effect see *Henkel v. Heyman*, 91 Ill. 97, and *Haviland v. Chase*, 39 Barb. 283.

Messrs. ABBOTT, OLIVER & SHOWALTER, for Holly Publishing Company.

Mr. FRANK C. CALDWELL, for Mrs. Josie T. Allin.

GARY, P. J. In 1886 the firm of Wilbur & Allin, crockery merchants in Chicago, became insolvent and made an assignment for the benefit of their creditors. Subsequent negotiations between them and their creditors resulted in an agreement, as follows:

“NOVEMBER 23, 1886.

“Whereas, the firm of Wilbur & Allin, of Chicago, Ills., is insolvent, and unable to pay their debts in full; now, therefore, in consideration of the premises and of the sum of one dollar to us in hand paid, the receipt of which we hereby acknowledge, we, the undersigned, creditors of said Wilbur & Allin, do hereby agree to accept fifty per centum in full payment and settlement of the several sums due us by the said Wilbur & Allin, in manner following, to wit:

“A partnership to be formed with Benjamin S. Allin as general partner, and the following names as special partners, to wit: Henry J. Luders, special capital four thousand dollars (\$4,000), the Park National Bank, or Mrs. Josie T. Allin, special capital of two thousand eight hundred dollars (\$2,800) William H. Paden, special capital of twenty-five hundred dollars (\$2,500), and Edward T. Keyes, special capital of twelve hundred dollars (\$1,200), in all ten thousand five hundred dollars (\$10,500). The sum of \$10,500 representing the present claims for borrowed money from the said special partners by the said Wilbur & Allin, and which said sum will be deducted from the total liabilities of about \$49,345.30, thereby reducing the claims against the said Wilbur & Allin in that amount.

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The said partnership, under the name and style of the Chicago Crockery Company, or such other name as may be adopted on or before the completion of this settlement, to give to us their six several promissory notes in equal installments, at two, four, six, eight, ten and twelve months from December 15, 1886, aggregating fifty per centum of the amount due us respectively.

“The condition of this agreement being such that all of the partners hereto agree not to draw any part of their special capital in the said co-partnership until each and all of the notes given to us, respectively, shall have been duly paid, and that this agreement shall be signed by all of the creditors within thirty days from the date hereof (excepting only those whose respective claims shall not exceed the sum of fifty dollars (\$50)).

“It is hereby understood and agreed, that upon the signing of this agreement by all the creditors, as above provided, all proceedings under the assignment of the said Wilbur & Allin may be discontinued, and the assets turned over to said partnership, as above mentioned.

“In witness thereof we have hereunto set our hands, as of the day and year above mentioned.”

Copies of said certificate and affidavit filed in organizing the special partnership follow, the signature omitted. Copy of said certificate :

“Certificate of limited partnership, in conformity with the statute concerning limited partnerships.

“We, the undersigned, do hereby certify that we have formed a limited partnership, to be conducted under the name and firm of B. C. Allin & Co., in the wholesale and retail crockery business, and everything to the said business appertaining; that the undersigned, Benjamin C. Allin, who resides in Chicago, Cook county, Illinois, is interested in the said co-partnership as a general partner, and that Edward T. Keyes, M. A. Luders, Josie T. Allin, William H. Paden and the Holly Publishing Company, who each reside in the said city of Chicago, are interested in said co-partnership as special partners, and as such special partners have each contributed to the common stock as follows, to wit:

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Edward T. Keyes.....	\$1,223.47
M. A. Luders.....	3,910.83
Josie T. Allin.....	1,393.33
William H. Paden.....	3,216.12
The Holly Publishing Company.....	1,209.18

Making the united sum of.....\$10,952.93
of capital stock contributed by the special partners to the
common stock.

"The said partnership to commence on the 10th day of January, A. D. 1887, and to terminate on the 10th day of January, A. D. 1888. It is mutually agreed that the partnership shall not be dissolved by the death of the partners. Made and severally signed by the said partners at the said city of Chicago, the 10th day of January, A. D. 1887."

Affidavit as follows:

"STATE OF ILLINOIS, }
Cook County. } ss.

"Benjamin C. Allin, of said county, having been duly sworn, deposes and says that he is the general partner named in the foregoing certificate by him subscribed, and that the amount of money, that is to say, the sum of \$10,952 93-100 dollars, as specified in said certificate, has been contributed as follows, to wit:

By Edward T. Keyes.....	\$1,223.47
M. A. Luders.....	3,910.83
Josie T. Allin.....	1,393.33
William H. Paden.....	3,216.12
The Holly Publishing Company.....	1,209.18

"Each as special partners as therein named to the common stock of said partnership, has been actually and in good faith contributed and paid by each of said special partners at cash value in goods, wares and merchandise, and by cancellation of indebtedness for money borrowed from each of said special partners, and has been duly applied to the common stock of said co-partnership."

This partnership so formed, also failed in October, 1887.

The note upon which this suit is brought, is one given pur-

McMahon v. Sankey.

suant to the terms of the agreement of which a copy is above shown, and the question is, are the appellees who signed the certificate and are mentioned in the affidavit as special partners, entitled to protection as special partners under the statute, or liable as general partners under the common law?

It may be a hard case, and contrary to what the parties intended, but did not express, to hold the appellees, other than B. C. Allin, as general partners; but the law is settled that "the statute authorizing limited partnerships must be substantially complied with, or those who associate under it will be liable as general partners." *Henkel v. Heyman*, 91 Ill. 96. And notice to the creditor that the debtors only expected or intended to be liable as special partners, will not restrict their liability. *Andrews v. Schott*, 10 Pa. St. 47.

The departure in the formation of this partnership, from the provisions of the statute, is so radical that no comment can make it more plain. A contribution of "a specific amount of capital in cash, or other property at cash value," is not made by postponing the payment of the indebtedness to the special partners due from a preceding insolvent firm, until the new firm shall have paid the other creditors of the old one. The preliminary agreement provided only that certain acts should be performed; the effect of those acts when performed, is to be determined by the general law, unless the parties make a special contract effectually excluding that result.

The finding and judgment for the defendants below was erroneous, and the judgment is reversed and the cause remanded.

Reversed and remanded.

DANIEL McMAHON AND JOHN POWERS

V.

ROSE ANN SANKEY.

Intoxicating Liquors—Sale—Variance—Death through Intoxication—Means of Support—Loss of by Wife—Damages—Evidence—Instructions—Practice—Special Interrogatories.

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44	218
35	341
54	469
35	341
67	213
35	341
78	521

1. A variance between the declaration and the proof can not be primarily raised herein.

2. A party encouraging the giving of an erroneous instruction can not be heard to complain thereof.

3. In an action brought by a widow against a saloonkeeper and the owner of the building in which the same was located, for the recovery of damages alleged to have been suffered, through loss of her means of support, by reason of the death of her husband while under the influence of liquor purchased in said saloon, this court holds, that the fact that during his lifetime her minor children had contributed money toward her support cut no figure, it not appearing that such gifts, in addition to her husband's contributions, did more than support her in the manner to which she was entitled, with a view to her husband's condition in life.

4. A trial court may properly refuse to submit special interrogatories to the jury, on the part of the defendant, when they were not shown to the counsel for the plaintiff until after the beginning of the argument to the jury.

[Opinion filed February 12, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

Mr. M. P. BRADY, for appellants.

Messrs. S. K. Dow, THOMAS M. THOMPSON and ELMER E. BEACH, for appellee.

GARNETT, J. The judgment appealed from was for appellee's loss of means of support, caused by the wrongful sale of intoxicating liquor to her husband, John Sankey, thereby producing his intoxication, by means of which he was fatally injured. At and before the time of the injury, McMahon was keeping a saloon in premises belonging to Powers, and was occupying the same as tenant of Powers, he permitting the occupation thereof with knowledge that McMahon intended to sell liquors therein.

Appellants claim that there is a material variance between the declaration and the proof as to the manner in which the injury happened, the declaration alleging that he fell from a street car and the wheel thereof ran over and crushed his leg,

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while the evidence shows that he voluntarily left the car, and the wheel did not run over his leg, but crushed it against a platform on the viaduct where the car was then in motion. This point, however, does not appear to have been in any way brought to the attention of the trial court. If made in that court, it would doubtless have resulted in an amendment of the declaration, and it is now too late for appellants to take advantage thereof. *City of Mattoon v. Fallin*, 113 Ill. 249; *Dulin v. Prince* 124 Ill. 77.

The first instruction given for the plaintiff is this

“The court instructs the jury that if they believe from the evidence that the plaintiff has been injured in her means of support by the sale or gift of intoxicating liquors to said John Sankey by said Daniel McMahon, during the time charged in the declaration, and if the jury further believe that the conduct of said McMahon in this regard was wanton and in wilful disregard of plaintiff's rights, then the jury may give, in addition to the actual damage to her means of support which the jury may believe from the evidence, under the instruction of the court, plaintiff had sustained, such further sum as in their sound discretion the jury may believe will be an example to deter others in like circumstances.”

That is said to be erroneous, as it authorizes a recovery although intoxication may not have been produced, or in the least influenced, by the liquor which McMahon sold to Sankey. The evidence of Sankey's intoxication at the time he was injured, and that it was produced by the liquor sold to him by McMahon, was ample to sustain the verdict, and as the fault of this instruction is the same as that found in the first instruction asked by and given for the defendants, the error is not available. A party who has encouraged the trial court to give an instruction wrong in principle can not be heard to complain of it. *I. C. R. R. Co. v. Latimer*, 128 Ill. 163; *Willard v. Swanson*, 22 Ill. App. 424.

The second branch of the instruction is supposed to submit to the jury the unrestricted privilege of arbitrarily determining what constituted a wanton and wilful disregard of the plaintiff's rights. The jury could scarcely have been led

astray by that expression. It only related to exemplary damages, and if any further explanation as to her right to recover such damages were needed, the third instruction given for the defendants sufficiently guarded the interests of the defendants in that respect. It was not the case of two plainly contradictory instructions, as in *Ill. Linen Co. v. Hough*, 91 Ill. 63, *Quinn v. Donovan*, 85 Ill. 194, but like the case of *Latham v. Roach*, 72 Ill. 179, and other similar cases, where there may have been a doubt as to the proper construction to be placed on the instruction for appellee, but those given for appellant entirely removed the doubt. The fifth instruction given for the plaintiff was as follows:

"The court instructs the jury that there is a legal obligation on the part of the husband to support his wife, and that this right of support is not limited to supplying the bare necessities of life, but includes comforts and whatever is suitable to the wife's situation and the husband's condition in life, and that whatever lessens or destroys her husband's ability to supply her with suitable comforts, to that extent injures her means of support, even though she is not thereby deprived of the necessities of life."

Appellants contend that the ruling is vicious in leaving the jury to infer that they could give damages for the money spent by Sankey at McMahon's saloon during the six months preceding his death, although he may not have become intoxicated. There was no proof of the amount of money which Sankey spent there for liquor, but it is fairly inferable from all the evidence, that the whole sum spent during the six months was comparatively trifling. That the attention of the jury was, by this instruction, directed to this feature of the case, does not seem probable, and it certainly could not have been without a total misunderstanding of the purposes of the suit, as the case was presented to the jury on both sides, on the theory that intoxication wrongfully produced by McMahon's sale of liquors to Sankey was the cause of action. What we have said about the explanation of plaintiff's first instruction applies here also. If there was any liability to misunderstand the instruction in question, it was completely removed by instructions given for the defendants which

McMahon v. Sankey.

pointed out the precise limits of plaintiff's right of recovery.

The sixth instruction requested by defendants, directed the jury that, "in considering the question of damages to plaintiff's means of support they should take into consideration any evidence, if any there be in the case, showing or tending to show that she was not entirely dependent on said John Sankey for her support."

The only evidence to warrant this charge was the admission of the plaintiff that her minor children, in her husband's lifetime, had at times contributed money toward her support. The earnings of the children were the property of her husband while he lived. Schouler's Domestic Relations, Sec. 252. The fact that they gave a part of them to their mother invested her with no legal right to any means of support in addition to her husband's earnings. But she was entitled to a support suitable to her husband's condition in life, and there is no evidence that the gifts of her children, in addition to her husband's power to earn money, would more than furnish such a support. If these combined means of support were no more than she was entitled to, surely the damages for the loss of the husband's contributions should not have been diminished by reason of the gifts of the children. This feature was entirely overlooked in the instruction as requested. We think there is no ground whatever for the criticisms of appellee's fourth instruction.

The court properly refused to submit special interrogatories to the jury, as they were not shown to the counsel for plaintiff until after the beginning of the argument to the jury. Sess. Laws, 1887, 185, Bradwell's Ed.

The verdict of the jury is conclusive on all the questions of fact, as the evidence on the material points in the case was of a conflicting nature, and the finding is not manifestly against the weight of the evidence, or the result of passion or prejudice. The judgment is affirmed.

Judgment affirmed.

CHICAGO, MILWAUKEE & ST PAUL RAILWAY COMPANY

v.

SOPHIA WILSON.

SAME

v.

JOHN M. WILSON, ADMINISTRATOR.

SAME

v.

SAME.

Railroads—Negligence—Crossings—Personal Injuries—Evidence—Instructions—Practice—Damages.

1. Negligence and due care, and degrees and comparisons of negligence, are questions of fact for the jury, and their determination should not be interfered with, unless it appears that they have disregarded their duty.

2. There is no rule of damages in actions brought to recover for the death of young children occasioned by the negligence of others.

3. Courts will review the findings where deceased had attained such an age that the value of his life to the next of kin had become the subject of evidence.

4. In actions brought for the recovery of damages from a railroad company for the death of two children and injuries to their mother, alleged to have been occasioned by its negligence, this court declines, in view of the evidence, to interfere with the verdicts for the plaintiffs.

[Opinion filed February 12, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Messrs. WALKER & EDDY, for appellant.

Messrs. FRANK A. JOHNSON and WILLIAM BROWN, for appellees.

GARY, P. J. These three cases all have their origin in one accident. In neither of them is it seriously urged that anything done or omitted in the Circuit Court was error, until the motions for new trials were denied.

35	346
51	313
35	346
58	420
35	316
60	522
35	346
62	495
35	340
69	18
85	846
95	4515

It is now insisted that the verdicts are wrong on the questions of negligence of the appellants and due care by the appellee in the first case, and that the damages are excessive in each case.

Wood street in the city of Chicago, is a north and south street, and is crossed upon the same level by eleven railway tracks at a right angle, the four northern ones being main tracks and the others side tracks. It is a fair conclusion from the evidence that a good many freight cars were at the time of the accident standing upon those side tracks, some of them upon the north one, and of these last the east end of one was very close to the west crosswalk of Wood street over the tracks. The distance between the south rail of the south main track and the north rail of the north side track was a little more than seven feet, and between the side of a freight car standing on the side track, and the side of the tender of a locomotive passing on the south main track, nearly four feet.

None of the tracks were owned by the appellants, but they run their cars on the two south main tracks. Under these conditions, in the afternoon of August 4, 1887, the appellee in the first case, a married woman about twenty-three years old, undertook to walk northward across these tracks on the west crosswalk of Wood street, carrying her year-old baby, John, on her arm, and leading her three-year-old boy, Murray F., by the hand. When she had crossed a part of the side tracks, she saw a passenger train going east on the north main track, and stopped and waited for it to pass. When it had passed she stepped upon the south main track and knew no more. She was struck senseless, and her children cut into pieces by a tender and locomotive of the appellants, backing eastward on the south main track at the speed of about six miles an hour. The bell on the locomotive was ringing at the time, but except so far as the presence of the tracks themselves is notice that cars may at any moment be expected to run upon them, there was no other warning to her of the approach of danger.

A flagman was on the north side of all the tracks, but hidden from her view, and she from his, by the passenger train.

The first of these cases is an action by the appellee for her own injuries, and the others, by the administrator of the children, for benefit of their next of kin, for their death. So long as railways and common highways cross each other upon the same level this class of accidents will continue to happen, and with the increase of population will multiply; and so long also, will juries, under such circumstances as this record shows, find verdicts against the railways, which the courts have no right to disturb. Negligence and due care, degrees and comparisons of negligence, are all questions of fact for the determination of a jury, and with that determination, neither the theory nor the history of trial by the jury, warrants any interference by a court, unless it is apparent that the jury have disregarded their duty. *O. & N. W. v. Traves*, 33 Ill. App. 307.

The damages awarded are \$5,000 to her, and in the other cases \$2,000 for the youngest, and \$1,941.66 for the oldest boy. These damages can not be disturbed.

There is evidence from which the jury might fairly find that her health is very seriously and permanently impaired. What is a fair and adequate—for if she is entitled to anything, she is entitled to adequate—compensation, can not be made the subject of mathematical calculation.

As to the death of young children, the authorities hold there is no rule of damages. *C. & A. R. R. v. Becker*, 84 Ill. 483; *Johnson v. C. & N. W. Ry.*, 64 Wis. 425; *Hooghkirk v. D. & H. Canal*, 63 How. Pr. 328. No case has been cited or found where the verdict in such a case has been set aside as excessive.

Where the deceased has attained an age that the value of the life to the next of kin becomes the subject of evidence, courts will review the findings. *C., E. & L. S. Ry. Co. v. Adamick*, 33 Ill. App. 412.

Exceptions were saved to the refusal of instructions asked by the appellants, undertaking to direct the jury as to what acts or omissions constituted negligence or its opposite, but the appellants do not seem to rely upon them, as, indeed, they could not, under the repeated decisions in this State. *Pa. Co. v. Frana*, 112 Ill. 398.

C. & W. I. R. R. Co. v. Roath.

The proximate cause of this accident was the sudden entrance, without any effectual warning, of the tender upon the cross-walk, its approach being hidden by the freight cars. Whether, and in what degree that constituted negligence by the appellants, was a question for the jury. And the conduct of Mrs. Wilson, in going upon the track without first ascertaining whether the tender was coming, was a like question for them. Their answer must stand.

There is no error in the records, and the judgments are affirmed.

Judgments affirmed.

CHICAGO & WESTERN INDIANA RAILROAD COMPANY

v.

BARCLAY ROATH, BY NEXT FRIEND, ETC.

Railroads—Negligence—Personal Injuries—Crossings—Child—Climbing upon Train—Special Findings—Evidence—Instructions—Flagman—Absence of.

1. A railroad company does not owe the duty of having a flagman at a crossing, to one injured while attempting at such crossing to climb upon one of its trains.

2. The fact that one who attempts to climb upon one of its moving trains is an infant in years and consequently without discretion and not chargeable with negligence, does not in case of injury give rise to liability on the part of such company, no duty incumbent on it being involved.

3. In an action brought to recover from a railroad company, for the loss of a leg by a child six years old, alleged to have occurred through its negligence, this court holds, that in view of the erroneous modification of certain instructions, the verdict for the plaintiff can not stand.

[Opinion filed February 12, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

This action was brought by appellee by his next friend to recover damages for the loss of his leg, which was crushed by being run over at the crossing of 68th street by some cars of

35	349
41	344
35	349
51	424
35	349
54	97
54	482
35	349
57	590
35	349
58	262
35	349
67	41
35	349
73	264
85	341
198	*54

a freight train which was running on appellant's road. The declaration alleges that the neighborhood of this crossing was thickly settled; that a depot was situated there; that a school at which a large number of pupils attended was near by, and that it was reasonably necessary for the protection of the pupils attending said school and the traveling public, that gates and a watchman should be kept by the company at this crossing; yet the defendant neglected to provide guards or other protection for children of tender years, and without discretion, whereby plaintiff, being then of the age of six years and without knowledge or appreciation of the danger of being about these tracks, and while in the exercise of all care which could reasonably be expected of one of his age, while passing over and upon said railroad, at and upon said 68th street, was run upon by a locomotive and train of cars of the defendant then being operated upon said railroad, and knocked down and his leg crushed, and amputation thereof made necessary whereby, etc.

On trial, special interrogatories submitted to the jury were answered as follows:

1st. Was the plaintiff struck by the engine? A. No.

2d. Was not the plaintiff run over by one of the freight cars attached to and in the rear of the engine? A. Yes.

3d. Was not the plaintiff at the time of the accident attempting to get on the freight train while it was in motion? A. Six jurymen, no; five jurymen, yes, and the jury can not agree on an answer to this interrogatory.

4th. Had not the plaintiff crossed over the track in front of the approaching freight train before the accident? A. Yes.

The jury returned a general verdict finding appellant guilty, and assessing appellee's damages at \$5,000, and from the judgment thereon this appeal is prosecuted.

Messrs. OSBORN & LYNDE, for appellant.

Mr. WILLIAM BROWN, for appellee.

MORAN, J. The train which injured appellee was moving north, and he was either crossing or had just crossed the tracks and was going toward the west on 68th street. After

the accident he was found some six feet north of the north sidewalk on said street. There was evidence tending to show that he got across the track before the accident, and that he was not struck or run over by the engine, but was run over by one of the cars in the rear of it, as the jury found; and also evidence tending to show that at the time of the accident he was attempting to climb on the moving train. Appellant requested the court to give to the jury, among others, the following instruction, which the court refused to give as asked, but gave as modified by the words in italics.

9. "The jury are instructed as a matter of law that if they shall find from the evidence that the injury to the plaintiff was caused by an attempt on his part to climb upon the train in question, while the same was in motion, *and if, from all the evidence in the case, the jury find that such conduct was an act of negligence or want of ordinary care on the part of the plaintiff*, then he is not entitled to recover, and your verdict should be for the defendant."

Unless this case can be distinguished on this point from C., R. I. & P. Ry. Co. et al. v. Eninger, 114 Ill. 79, we have the express authority of the Supreme Court, that the refusal to give said instruction as asked, and modifying it as was done, was error.

The distinction is sought to be drawn by the fact that in that case there was evidence to show that at the time the plaintiff was struck he was traveling along and upon the railroad's right of way; while here the boy injured was proceeding rightfully over the crossing and was injured upon the same. But in that case the contention of the plaintiff was that he was injured at a street crossing, while it was defendants' evidence that he was walking on the track when struck; and it was in view of this issue that the court held it error to instruct the jury that if the injury happened because of there being no flagman at the crossing to give warning of the approach of the train, the plaintiff was entitled to recover. But the language of the court in discussing the instruction having reference to climbing on the train while in motion, shows that said instruction should have been given without

any reference to the question of flagmen at the crossing. The opinion states: "The defendants were liable only for negligence. Negligence is the breach of duty which one owes to another. The only acts of negligence charged against the defendants were not ringing a bell or sounding a whistle, not having a flagman at the crossing, and running at a greater rate of speed than six miles an hour, and there was no evidence tending to prove any other. *The defendants owed no such duty as the breach of is here charged, to any trespasser attempting to climb upon their trains.*" If language means anything, the foregoing is an authoritative declaration that a railroad company owed no such duty as having a watchman or flagman at a crossing, to one injured while attempting at or upon the crossing to climb upon the train.

The fact that one who attempts to climb upon a moving train is an infant in years and consequently without discretion, and not chargeable with any negligence, does not, if he is injured, give rise to liability on the part of the railroad company, even if the plaintiff has exercised the highest degree of care; because he can not recover unless there is negligence on the defendant's part which caused the injury. There can be no negligence without the failure to observe some duty. The attempt to govern this case by the rule that obtains where a defendant has carelessly left exposed to ready access some dangerous machine, in its nature or operation alluring to the instincts of childhood, is not tenable. If steam roads owe the duty of preventing children from climbing on their moving trains at crossings, then the operator of the street car, or the driver of a farmer's cart, or any other vehicle which runs upon the street, and by its movement or its rumble excites a childish desire to mount and ride, must in logic and in reason owe a similar duty, and be alike liable for its non-performance. Such a doctrine is not founded in justice or reason, and is without the support of legal sanction.

Defendant asked the court to give instruction No. 10, which as modified by the court was given as follows, the modification being shown by italics:

"If the jury shall find from the evidence that at the time of the accident the defendant did not have stationed at 68th

street crossing any flagman, and that this crossing was a place of danger, and that it was the duty of the defendant, at the time in question, to have stationed at this crossing a flagman, but the injury to plaintiff was caused by his attempting to climb upon the defendant's train while the train was in motion, *and from all the evidence in the case the jury find that such conduct was an act of negligence or want of ordinary care on the part of the plaintiff*, then they are instructed to disregard the evidence as to failure to station a flagman at such crossing, or as to the speed of the train, and that the plaintiff can not recover, but that their verdict should be for the defendant."

Considerations already stated required the giving of said instruction as asked. The modification introduced a confusing element, and carried the implication, that as the child's climbing on the train could not be charged against him as a want of care, the failure to have a flagman on the crossing or running the train at a speed forbidden by law, might warrant a recovery against the company.

If these instructions had been given as asked, it is plain that the five jurors who found from the evidence that the boy was attempting to climb on the moving train when injured, could not have agreed to a general verdict against defendant, and all the jurors would have seen that that was a controlling question in the case, and have examined with more care the evidence on that point. The modifications made rendered the question of whether plaintiff was climbing on the train or not at the time of the injury, unimportant, by turning it into an inquiry whether such climbing constituted negligence on his part.

The true question was, did the injury occur by reason of the defendant failing to discharge any duty which, at the time and under the circumstances of the accident, it owed to the plaintiff? There are other errors in modifying instructions which we think it unnecessary to discuss, as an observance of the law as stated herein will prevent the same errors occurring on another trial.

For the errors indicated the judgment will be reversed and the case remanded.

Reversed and remanded.

WILLIAM H. GRUBEY

v.

THE NATIONAL BANK OF ILLINOIS.

Negotiable Instrument—Note—Gaming—Board of Trade—Options—Evidence.

1. A question, the answer to which would not be relevant to the issue, should not be asked.

2. Nor should a question as to a witness' understanding, based upon a certain conversation; the witness must give a narration of the facts, and any conversation testified to must be given in the words, or the substance thereof stated.

3. Nor as to whether a third person made a report as to certain transactions, without stating when, nor where a question is hearsay.

4. In an action brought to recover upon a promissory note, the defense being that the consideration thereof was made up of losses in gambling transactions upon the Board of Trade, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff.

[Opinion filed February 12, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. FRANCIS A. RIDDLE and JOHN S. STEVENS, for appellant.

Mr. M. P. BRADY, for appellee.

The law is well established in this State by numerous adjudications by this court and by the Supreme Court, that contracts for the sale or purchase of commodities, deliverable in the future, are not within the prohibition of the statute, even though the party selling for future delivery has not the commodity on hand at the time of sale. *Logan v. Musick*, 81 Ill. 415; *Pixley v. Boynton*, 79 Ill. 351; *Sanborn v. Benedict*, 78 Ill. 309; *Wolcott v. Heath*, 78 Ill. 433.

To hold that a contract is void under the statute, it must be proven that it was merely colorable; that the parties did not intend to actually buy or sell, and that their real intention was to adjust or settle differences in prices caused by the fluctua-

tions of the market between the time of making the pretended contract and some time in the future—in a word, to gamble. *Tenney v. Foote*, 4 Ill. App. 594, affirmed in 95 Ill. 99.

The effect of the testimony of appellant, and the evidence furnished by the circumstances of the case is, that appellant, by delivering the note to Henrotin, sent him forth as his agent to obtain money for it by a sale thereof to the bank, and that the consideration of the note was the money the bank gave for it. Therefore, even did the evidence show that a part of the balance of account due Henrotin, to pay which the money to be obtained on the note was intended, resulted from a gambling transaction, the bank would not be affected by it, and would be entitled to enforce collection of the note. *Roberts v. Blair*, 16 P. Reporter, 717; *Krahe v. Alexander*, 9 S. E. Reporter, 991; *Bangs v. Hornig*, 30 Fed. Rep. 97; *Hoyt v. Cross*, 14 N. E. Rep. 801.

There is no evidence that the bank was in anywise connected with the transaction on which the claim against appellant arose, nor that it had any knowledge or was chargeable with notice of the purpose to which the money raised on the sale of the note was to be applied. Nor, indeed, is there any evidence that any part of the amount of Henrotin's claim against appellant was based upon an illegal transaction or consideration.

GARNETT, J. To a suit by appellee against appellant on his promissory note for \$1,000, the defendant set up as a defense that the consideration for the note was made up of losses in gambling transactions on the Board of Trade, in Chicago. Appellant testified in his own behalf, and put in evidence numerous statements of account rendered to him by his broker, Charles Henrotin. No other evidence for the defense was given. The statements set forth a large number of purchases and sales of stock, grain, pork, and "puts" and "calls."

On the trial appellant was asked this question: "What do you mean by 'calls' and 'puts'?" Appellee's objection to

the question was sustained by the court, and appellant excepted to the ruling. It was immaterial what the witness meant by "calls" and "puts." We must presume that an answer to the question would not have disclosed the meaning of the terms on the Board of Trade, and their meaning to appellant was not relevant to the issue.

To this question, "What understanding, if any, did you have with him (Henrotin) at that time, with reference to the character of the business to be done," the court also sustained an objection. It is the business of a witness to give a narrative of facts, and any conversation he testifies to he must give in the words used, or he must state the substance of what was said. His understanding is merely his conclusion, which may or may not be warranted by the facts. *Hewitt v. Clark*, 91 Ill. 605; *Bragg v. Geddes*, 93 Ill. 39.

The next question to which appellee's objection was sustained, was: "I will ask you whether or not Mr. Henrotin reported to you as having bought and sold the several articles and amounts represented in these papers?" The ruling of the court was right for two reasons: 1. No time was referred to, in the question, as to the supposed report by Henrotin. The answer might have been based upon what Henrotin reported to him, just before the witness was called to testify. 2. The evidence sought by the question was hearsay. The issue was not as to what Henrotin told Grubey, but as to the actual facts connected with the transaction.

The defendant having testified that he never received, delivered or paid for any of the articles purchased or sold, was asked how the several transactions shown on the statements of account were in fact settled between him and his broker. Again the court sustained plaintiff's objection to the question. The transactions were *not* between the appellant on the one side and Henrotin on the other, but between appellant and third parties. What the facts were could only be shown by placing Henrotin or the third parties on the stand. What Henrotin reported to appellant was hearsay. What settlements were made between appellant and Henrotin was immaterial and had no tendency to prove that Henrotin had, as agent for appellant, engaged in gambling transactions with

third parties. Settlements between the principal and his agent, on the basis of differences only, through a long and unbroken series of transactions, might be competent evidence of the unlawful character of the transactions as between the principal and agent, but could not be received as evidence against appellee, an entire stranger to the business. So far as appellee is concerned such settlements do not tend to prove that the broker, acting for his principal, did not receive and pay for grain purchased, or delivered such as he had sold.

The statements of account certainly prove nothing more as against appellee than Henrotin's oral report to appellant would prove, and as appellant testified that Henrotin transacted all the business for him, and that he gave it no personal attention, it follows that there really was no admissible evidence tending to prove that the considerations for the note was made up of losses on gambling contracts. If Henrotin had been called as a witness by the defendant, it can not be pretended that it would have been competent to prove by him that he told the defendant that the transactions were of a gambling character. The reason is the same in either case, that is, the defense of the principal can not be proved by statements made to him by his agent.

The comments made upon the rulings referred to, apply with equal force to the assignment of error, which complains of the refusal of the court to permit the witness to answer other questions.

The note sued on was made payable to appellant's own order, and indorsed by him to the order of the appellee. He testified that he gave the note to Henrotin, and that "he raised the money on it the same as the others." From this evidence the inference is very strong that the note was given to Henrotin in his capacity of broker for appellant, for the purpose of raising money for appellant, and not as payment to Henrotin on account of commissions and losses on the Board of Trade. The burden of proof was on appellant to make out his defense, which we think he has clearly failed to do.

The judgment is affirmed.

Judgment affirmed.

MOLINE WAGON COMPANY

v.

PRESTON & COMPANY.

Evidence—Cross-examination—Witness—When Excused from Testifying.

1. Upon cross-examination a witness may be asked any question tending to impeach his impartiality in a given transaction, and he will not be excused from answering unless he claims the privilege on the ground that he will, by so doing, expose himself to punishment; and mere disgrace without danger of punishment is not enough to so excuse him.

2. In the case presented, this court holds that the trial court erred in sustaining an objection to a question asked a witness upon cross-examination, the same being relevant to the cause on trial, as tending to show whether the witness was under peculiar obligations to the party calling him, and that the fact that a certain bargain might have been proved by other witnesses did not cure the erroneous exclusion of testimony offered.

[Opinion filed February 12, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Messrs. OSBOEN & LYNDE and CHARLES DUNHAM, for appellant.

The court erred in refusing to allow the plaintiff to cross-examine Whittle as to whether he was not indebted to Preston & Co., and in refusing to allow it to show that he was indebted to the defendant for a large amount of money on indebtedness which was not incurred by Preston & Co.'s consent.

The jury's verdict depended entirely on whether they believed the testimony of Rosenfield and Deere that Whittle did make the agreement in question, or the testimony of Whittle that he did not make this agreement. Their testimony on that question, the only question in controversy, was in direct, absolute conflict. The two witnesses for the plaintiff swore flatly that this agreement was made, while Whittle

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44	343
35	358
184s	386

swore that he did not make it; and the jury preferred to believe Whittle's testimony.

It can not be questioned but that it was proper and competent for the plaintiff to cross-examine Whittle as to his relations to the defendant, in whose behalf he was testifying. This we understand to be the general rule laid down by all of the authorities. Greenleaf on Evidence (12th Ed.), Secs. 446 450; Thompson on Trials, Sec. 450; Taylor on Evidence, Secs. 1428, 1440, 1442; Stephen's Digest of the Law of Evidence, Art. 129, p. 185.

This rule is so clearly stated in Thompson on Trials, Sec. 450, that we quote it at length:

"It is one of the objects of a cross-examination to discover the motives, inclinations and prejudices of the witness, for the purpose of reducing the effect which might otherwise be given to his evidence. Accordingly it has been well said that 'it is always competent to show the relations which exist between the witness and the party against, as well as for, whom he was called.' The general rule is that anything tending to show bias or prejudice on the part of a witness may be brought out on his cross-examination. The reason for the rule is that such matters affect the *credit* (the italics are the author's) of the witness, and it is therefore material to indulge in such an inquiry." *Phenix v. Castner*, 108 Ill. 207.

In *Starks v. The People*, 5 Denio, 108, the court says, in reference to questions asked on cross-examination and not permitted: "It is always competent to show the relations which exist between the witness and the party against, as well as the one for, whom he was called. The inquiry is material, as it goes directly to the credit of the witness in the particular case." *Newton v. Harris*, 2 Seld. 345; *People v. Furtado*, 57 Cal. 345.

In Taylor on Evidence, Sec. 1440, the author states that, whether questions respecting the *motives, interest or conduct* of the witness, as connected with the case or with either of the parties, are irrelevant, is a point on which the authorities differ; and cites, among other authorities, the case of *Thomas v. David*, 7 C. & P. 350, where it was held, in an action on a

promissory note, the execution of which was disputed, material to ask the subscribing witness whether she was not the plaintiff's kept mistress. In Sec. 1442 the author states that the general rule is that the witness may be asked any questions tending to impeach his impartiality, and that his answers might be contradicted by other witnesses; referring to the decision in *Attorney General v. Hitchcock*, 1 Exch. Rep. 94, 100, 102; and *Miles v. Sacket*, 30 Hun, 68.

Messrs. HOYNE, FOLLANSBEE & O'CONNOR, for appellee.

GARY, P. J. Both these parties are corporations, and the question between them on the trial in the Circuit Court was whether certain negotiable paper bought by the appellants from the appellees was so bought with the privilege of return. Mr. Whittle, the business manager of the appellees, having testified on their behalf that no such privilege was in the bargain, was asked on cross-examination by the appellants, "Are you indebted to Preston & Co.?" and on objection by the appellees, counsel for appellants stated that they desired to show that the witness was so indebted for a large amount of money, or indebtedness which was not incurred by consent of the appellees.

The objection was sustained and the appellants excepted. The rule that on cross-examination a witness may be asked any question tending to impeach his impartiality, is universally recognized by the text books, and the only doubt is as to when his answer may be contradicted by other testimony. *Phenix v. Castner*, 108 Ill. 207; 2 Ph. Ev. C. & H. 905; 2 Tay. Ev. Sec. 1442.

And the witness will not be excused from answering unless he claims his privilege on the ground that he will, by answering, expose himself to punishment.

The privilege is his, and not that of the party. 1 Greenl. on Ev. Sec. 451; and mere disgrace without danger of punishment, is not enough to ground it upon. *Ibid.* and Sec. 454. The question objected to did not carry with it any necessary implication of crime committed, or even of acts disgraceful.

Byrne v. O'Neill.

An indebtedness without the consent of the appellees may have accrued through some error of judgment, or lack of vigilance in the conduct of their business, for the results of which he was pecuniarily responsible, or under a guaranty of the fidelity of another.

As the question was relevant to the cause on trial, as tending to show whether the witness was under peculiar obligations to the party calling him (2 Tay. Ev. 1231-3), it was removed from the class of cases in which it is held to be discretionary with the trial judge whether he will allow questions to a witness which charge him with misconduct in matters wholly unconnected with the pending cause.

If the bargain was as the witnesses for the appellants said, that the paper might be returned "at any time," there was no room for the inquiry as to what would have been a reasonable time, and all competent testimony offered tending to inform the jury whether that was the bargain, should have been admitted. If, as argued, the appellants might have proved the same matter by other witnesses, that does not cure the error. *Mackin v. Blythe*, 35 Ill. App. 216.

The exclusion was error and the judgment must be reversed and the cause remanded.

Reversed and remanded.

HARRY BYRNE

v.

J. D. O'NEILL.

Judgments—Motion to Set Aside—Practice—Continuance—Absence of Party to Suit.

Upon motion to set aside a judgment, and for a new trial, said judgment having been rendered in the absence of petitioner, a party to the suit, it clearly appearing that such absence was due to a misunderstanding on his part, this court declines to interfere with the judgment against him.

[Opinion filed February 12, 1890]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Messrs. JONES & LUSK, for appellant.

Messrs. GARTSIDE & LEFFINGWELL, for appellee.

Per Curiam. The trial of this case was entered upon before the judge, a jury being waived, and when partially heard the further hearing was, by agreement of the parties, postponed till notice should be given either side to resume the trial.

Appellant and his counsel consulted as to when it should be tried, and by appellant's direction his counsel gave notice to take up the case on a particular day. When that day came appellee was in attendance with his counsel, and appellant's counsel was present, but appellant was absent, and his counsel was unable to suggest to the court any ground or reason for his absence. Under such circumstances the court refused to further postpone the trial, and proceeded to hear the evidence and render a judgment thereon against appellant.

A motion was afterward made by appellant to set aside said judgment, and for a new trial, which motion was overruled by the court, and it is from said ruling that this appeal is prosecuted. We have examined the affidavits filed in support of said motion, and they disclose that appellant's absence was due to a misunderstanding between himself and his attorney, as to whether he should be notified that the trial would proceed on the day for which notice had been given. This misapprehension was the fault of appellant or his counsel; most probably wholly his own, and certainly not the fault of the other side. There was a clear lack of diligence due to inattention and negligence, for which alone appellant was responsible, and which is in no manner excused. Under such conditions it would require a case to be made out on the merits, so clear that there could be little doubt of the inequality of the judgment, before a court would be called on to set aside the judgment. The affidavits showing appellant's merits make out no such case. It is by no means clear from the

Young v. The People.

facts stated in them, that appellant had a complete defense to appellee's claim. We are of opinion on a careful examination of all the points presented, that the refusal of the court to set aside the judgment against appellant was not an abuse of the discretion which the judge was called upon to exercise, and unless the course of the trial court on such a matter amounts to an abuse of discretion, there is no basis for the interference of a reviewing court.

The judgment must be affirmed.

Judgment affirmed.

MATT YOUNG AND FRED TAEGER

V.

THE PEOPLE, FOR USE, ETC.

Administration—Personal Property—Erroneous Order to Sell as—Subsequent Order to Refund—Principal and Surety.

1. As a general rule an administrator takes no estate, title or interest in the real estate of his intestate, and the Probate Court can authorize him to sell it only by pursuing the statute governing such cases.

2. The sureties upon an administrator's bond are not liable for moneys coming to his hand through an erroneous order of the Probate Court, he having no right as administrator to receive or retain the same.

[Opinion filed February 12, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. ARNOLD TRIPP, for appellants.

Mr. M. S. BOWEN, for appellee.

GARY, P. J. One John Murphy was administrator of the estate of Hannah Goodman, and the appellants were sureties on his bond, in the Probate Court. Murphy obtained, in the Probate Court, an order giving him leave to sell the personal

estate of the deceased. Under that order he sold to Bridget Mitchell the interest of the deceased in a frame building, for \$275, and received the money. That sale the court first approved, but afterward held that the interest of the deceased in the building was not personal property, and ordered Murphy to refund the money to Bridget Mitchell. He did not refund, though she demanded the money, and this suit upon his bond is brought for his default. It is the general law that an administrator takes no estate, title or interest in the real property of the deceased. *Le Moyne v. Quimby*, 70 Ill. 399, and cases there cited. And the Probate Court can authorize him to sell it only by pursuing the statute in such case made and provided. There was, in this case, no attempt to sell in that mode. It follows that by mistake, which Murphy, or the court, or both made, he had in his hands money which did not belong to him as administrator, and which he had no authority, as administrator, to receive or retain. For this money he is liable individually. It is not a charge upon the estate of Hannah Goodman.

Numerous cases are collected in a note in 1 Coms. Ex., 599, which hold that the sureties are not liable in such a case. See also *Douglass v. Mayor*, 56 How. Pr. R. 178. The judgment against the appellants is erroneous, and must be reversed and the cause remanded.

Reversed and remanded.

35	364
55	217
85	364
109	540

THE J. W. REEDY ELEVATOR MANUFACTURING
COMPANY

V.

ANNA PITVOWSKY ET AL. BY NEXT FRIEND, ETC.

Practice—New Trial—Appeal.

An order overruling a motion for a new trial is not final, and no appeal lies therefrom.

[Opinion filed February 12, 1890.]

Cary v. Norton.

APPEAL from the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

MR. GEORGE R. GRANT, for appellant.

MESSRS. DUNCAN & GILBERT, for appellee.

GARNETT, J. The appellant has brought this record to this court on the supposition that the County Court rendered a judgment against it for \$275. The appeal bond recites that such is the fact, but no judgment is found in the record. A verdict for \$225 is shown, a motion for a new trial and order overruling the same, whereupon appeal was prayed by appellant, and allowed. The order overruling the motion for a new trial was not final, and no appeal lies therefrom.

There is nothing here for this court to affirm or reverse, and therefore the appeal must be dismissed.

Appeal dismissed.

WILLIAM H. CARY ET AL.

v.

OTTO NORTON.

Master and Servant—Contract of Service—Statute of Frauds—Wages—Wrongful Discharge.

In an action brought to recover a balance alleged to be due under a contract of service, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff.

[Opinion filed February 12, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

MESSRS. CRATTY BROS. & ASHCRAFT, for appellants.

Mr. CARLOS P. SAWYER, for appellee.

Per Curiam. Appellee brought this action against appellants to recover for a balance of salary for the year 1887, which was due for the time after, as he claimed he was wrongfully discharged from their employment. The defense was that the contract of employment was not to be performed within one year from the making thereof, and consequently he was entitled to wages only for the time he continued in service.

Whether the contract was within the terms of the statute of frauds was made an issue of fact between the parties on the trial, and the jury found under correct instructions by the court, in favor of appellee, on that as well as the other issues in the case. We have examined all the points made by appellants' counsel for reversal, and there is none which warrants interference with the judgment. The instruction, of the modification of which complaint is made, was not strictly correct as asked, and might have been refused. As given by the court the law is correctly stated.

Neither was there error in the admission of evidence which is available on this record to appellant, nor in rule as to the measure of damages, or appellee's duty to seek other employment.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

FAIRBANK CANNING COMPANY

v.

MAURICE WEILL AND DAVID BLUM.

Sales—Failure to Deliver in Excess of Certain Amount—Damages—Evidence.

In an action involving the sale of a lot of solder, the contention being as to the quantity sold, this court holds, in view of the improper admission of certain testimony on behalf of the plaintiffs, that the verdict in their favor can not stand.

35	866
92	580

Fairbank Canning Co. v. Weill.

[Opinion filed February 12, 1890.]

APPEAL from the Superior Court of Cook County; the
Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. DUPEE, JUDAH & WILLARD, for appellant.

Messrs. KRAUS, MAYER & STEIN, for appellees.

GARNETT, J. This appeal turns upon the question whether the trial court erred in admitting incompetent evidence. The suit was in assumpsit by appellees to recover damages for the failure to deliver to them certain solder which they claimed appellant had sold them. Appellant was the owner of a factory for canned goods at the Union Stock Yards in Cook county, and had a quantity of solder in one of the rooms of the factory building. The witnesses vary in their statements as to the amount of the solder there, but it appears to have been from 14,000 to 20,000 pounds. It was admitted that about September 1, 1887, an oral contract was made by appellant, through one Vogel, appellant's vice-president, with Blum, to sell to him, or to appellees, some solder. Appellant insists that the quantity agreed on was 10,000 pounds, and that amount was actually delivered to appellees in four different loads. Appellees insist, however, that they bought from Vogel all there was at that time in the room referred to, and that the amount was about 20,000 pounds altogether. Plaintiffs' claim for damages is for the refusal to deliver more than the 10,000 pounds admitted to have been sold. The verdict and judgment was for appellees.

On the trial, when Blum was testifying on behalf of appellees, he was permitted, over appellant's objection, to state what one Newgass said to him when he was loading his wagon with the third load of solder that was delivered. The witness testified that when he was leading his wagon at that time, a man whose name he did not know, but who was a hunchback, told him that was all he was going to get; that witness told him he had bought all that was in that room; that the hunchback

told him to go and see Mr. Newgass; that they then went to see Newgass, who said Mr. Vogel had sold to witness all the solder in that room, and that witness then turned to the hunchback and said, "You see I am right." There was no evidence tending to prove any authority from appellant to the person described as the hunchback, or to Newgass, to transact any of the business in relation to the solder. The conversation testified to by Blum was not in the presence or hearing of Vogel or any one having authority to represent the appellant. It is apparent that the evidence should have been excluded on appellants' motion. Its admission was error which can not be overlooked, as the evidence is not so clear and satisfactory in plaintiff's favor, that we should be warranted in saying that it had no material effect in influencing the finding in their favor.

The judgment is reversed and the cause remanded.

Reversed and remanded.

35	368
46	370
35	368
189	240

WILLIAM T. BLAIR

v.

THOMAS W. SENNOTT.

Certiorari—Assets of Deceased Persons—Jurisdiction of Probate Court—Appeal.

1. The Probate Court has jurisdiction of the person of one who is present in answer to a citation.
2. The remedy for the correction of any error in a final order of the Probate Court is by appeal.
3. A judgment of the Probate Court touching matters of which it has jurisdiction can not be reviewed by *certiorari*.

[Opinion filed February 12, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Mr. C. C. MARCH, for appellant.

Mr. J. F. SNYDER, for appellee.

GARY, P. J. On the 18th of April, 1889, the appellant filed in the Circuit Court his petition for a *certiorari* to the Probate Court.

The record here is in great confusion, but it does appear, that on the 17th of April, 1889, the appellant being before the Probate Court on a citation previously issued at the suit of Martha W. Taft, administratrix of Henry E. Taft, deceased, she then filed in the Probate Court her amended petition, in which, after showing an agency for the deceased by the appellant, the part material to the question here is that which reads as follows: "Your petitioner further shows that the said William T. Blair has collected, as she is informed and believes, all of the money due and owing on the note of said Starretts made payable to the said Henry E. Taft, and has the same in his possession." The single question upon the record is, whether the Probate Court had jurisdiction, for if it had, its judgment can not be reviewed by *certiorari*, as the remedy for the correction of any error in the final order, if any was committed, is by appeal. *Hyslop v. Finch*, 99 Ill. 171, and numerous cases there cited.

The Probate Court had jurisdiction of the person of the appellant, as he was present in answer to a citation. Of the subject-matter of requiring any person having possession of assets belonging to any deceased person, or if the same has been converted, of the proceeds or value thereof, to deliver them to the administrator, sections 81 and 82, Chap. 3, R. S., give the Probate Court jurisdiction. The doctrine of *Propst v. Meadows*, 13 Ill. 157, that as to the Probate Court, "when it is adjudicating upon the class of questions over which it has general jurisdiction, as liberal intendments will be granted in its favor as would be extended to the proceedings of the Circuit Court," has been often affirmed by the Supreme, and followed by this court. The jurisdiction invoked in this case is part of the general jurisdiction of the Probate Court in the administration of the estates of deceased persons. "If the jurisdiction of the court extended over that class of cases, it

was the province of the court to determine for itself whether the particular case was one within its jurisdiction." Gardner v. Maroney, 95 Ill. 552. And whether the question arises upon the sufficiency of the petition, or of the proof to support it, the order of the court can not be collaterally attacked for want of jurisdiction. Landt v. Hiltz, 19 Barb. 283.

It is the same principle as is applied in Miller v. Pence, 115 Ill. 576, where it is held that this court, where it has jurisdiction of the person, has "jurisdiction to adjudge whether the particular case involves a freehold, and so whether the court has jurisdiction of the subject-matter, and necessarily, therefore, if the court should make a mistake and adjudge that no freehold is involved, where, in fact, freehold is involved, it would be but error, and cause for reversal on appeal or writ of error." For this position is cited Bostwick v. Skinner, 80 Ill. 147, a case involving the probate jurisdiction of the County Court of Cook County in 1855.

The Circuit Court committed no error in quashing the *certiorari*, and the judgment is affirmed.

Judgment affirmed.

JOHN K. POLLARD

v.

DAVID RUTTER.

Practice—Preliminary Call—Dismissal—Bill of Exceptions—Amendment—Matters in pais.

1. Matters *in pais* may be introduced into a bill of exceptions by way of amendment, after the term, and after the lapse of the time allowed for presenting and filing the bill, if the court was in possession of sufficient memoranda, or notes, to give definite information as to what the actual proceedings were; and unless the contrary affirmatively appears, it will be presumed that the judge who made the amendment was thus informed.

2. A court can have no better source of information than its own record.

[Opinion filed February 12, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

MR. M. S. BOWEN, for appellant.

MESSRS. FLOWER, SMITH & MUSGRAVE, for appellee.

GARNETT, J. This suit was commenced by appellee against appellant before a justice of the peace, and judgment rendered for appellee. The case was appealed to the Circuit Court by appellant, where it was pending February 1, 1889, but on that day the appeal was dismissed for want of prosecution, on the preliminary or first call of the calendar, in that court. The dismissal was by virtue of a recorded rule of the court, which had been printed among its rules of practice, and was accessible to all the attorneys of the court. This rule is not substantially different from the one which was held to be valid in *Hinckley v. Dean*, 104 Ill. 630, and of which the Supreme Court there said: "The rule operates fairly, equally and uniformly on all litigants."

In the case at bar the rule of court was not set out in the original bill of exceptions, but by order of the Circuit Court, made in November, 1889, and after lapse of the time allowed for filing a bill of exceptions, the bill was amended, and the rule appears by the amendment to have been in full force when the appeal was dismissed. The power of the Circuit Court to make the amendment, at the time it was made, is denied. Matters *in pais* may be introduced into a bill of exceptions by way of amendment, after the term, and after the lapse of the time allowed for presenting and filing the bill, if the court was in possession of sufficient memoranda, or notes, to give definite information as to what the actual proceedings were. And unless the contrary affirmatively appears, it will be presumed that the judge who made the amendment was thus informed. *Gebbie v. Mooney*, 22 Ill. App. 372.

There could be no better source of information than the court's own record. The rule appearing to have been spread of record in the Circuit Court there is no danger in allowing

the amendment of the bill in that respect. It has none of that element of uncertainty which makes necessary the prohibition of such amendments merely from the memory of the judge.

The Circuit Court committed no error in following its own rule.

The judgment is affirmed.

Judgment affirmed.

35	372
44	87
35	372
64	355

35	372
1908	1 80

THE DUEBER WATCH CASE MANUFACTURING COMPANY

V.

PETER LAPP ET AL.

Sales—Set-off—Discounts—New Trial—Surprise—Newly Discovered Evidence—Negligence.

1. A plaintiff can always avert the consequences of a surprise by moving for a continuance or dismissing his case, and to proceed with the case without doing so waives the surprise.

2. In an action brought to recover for goods sold, a notice of set-off being filed setting forth a previous agreement touching discounts, this court holds that in view of such notice, the evidence introduced by the defendant can not be looked upon as a surprise, and that the plaintiff was negligent in failing to produce, upon trial, the contract relied on by it.

[Opinion filed February 12, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. R. W. CLIFFORD, Judge, presiding.

Mr. R. B. BACON, for appellant.

Mr. H. MUSGRAVE, for appellees.

MORAN, J. Appellant brought an action to recover for goods sold to appellees. Appellees filed a notice of set-off for certain discounts or rebates on goods sold to them by appellant under an alleged contract or custom of dealing which

had obtained between them. The trial was upon the claim of set-off, and resulted in favor of appellees. As to the facts upon the question of whether appellees were entitled to any set-off, and how much, there was a conflict in the evidence, but there was no error of law either in admitting or rejecting evidence, or in instructing the jury, and the verdict settled the dispute of fact in favor of appellees.

Appellant moved for a new trial on the ground that it was surprised by the testimony introduced by appellees, and that it has discovered evidence since the trial which would show that appellees were not entitled to the set-off allowed to them by the verdict. The only ground of surprise is that appellees testified to a certain agreement, which they claimed had been made by appellant's agent with them several years before the trial, and that appellant had been allowing them rebate under said agreement in all the dealings with them during the subsequent years.

Appellees had stated in their notice of set-off, that they would prove that they had dealt with appellant for many years, and had, during said time, purchased certain kinds of watch cases upon the understanding and agreement that if, at any time, appellant reduced its prices or increased its discounts on such watch cases to the retail trade a proportionate discount should be allowed to appellee on all such goods as they should have on hand at time of such reduction or discount, and that the goods sued for in this case were purchased upon such understanding and agreement. Appellant had thus distinct notice that appellees claimed the existence of such an agreement or understanding, and were bound to know that they would attempt to prove it. Furthermore, appellant, being a corporation, must have known that such a contract would have to be shown to have been made, if made at all, with its agent or agents in the dealings with appellees. The claim that appellant was surprised by appellees' testimony that the sale was under an old agreement, when, as appellant claims, appellees knew such old arrangement had been subrogated by a new and later one, must be met by the same answer. The notice of set-off informed appellant that such was appel-

lees' claim. The real surprise in this case seems to have been that appellees introduced evidence to support their notice of set-off, which evidence appellant was not able to rebut to the satisfaction of the jury. Such a surprise the defeated party sustains in most cases.

But the rule of law with reference to granting new trials on the ground of surprise is not as liberal in its application to plaintiffs as to defendants. A plaintiff can always avert the consequences of a surprise by moving for a continuance or dismissing his case. To proceed with the case is to waive the surprise. The fact that there was a plea of set-off did not prevent a motion to the court for leave to dismiss or to continue, and the court would have acted upon such motion as sound legal discretion should require.

If the discretion was wrongfully exercised to appellant's injury, it would be righted on review. The plaintiff can not be permitted to pass by the discretion of the trial court without invoking it, and take his chances on a verdict by the jury, and then require the court to set the verdict aside and give him another chance on the ground that he was surprised by defendants' evidence. This is clearly shown by the cases cited in appellees' brief.

As to the newly discovered evidence, it is cumulative in character, and not conclusive; but the most serious objection to granting the relief sought on that ground is the want of diligence shown in failing to have it at the trial. It is claimed that such evidence consists of a contract between the parties which took the place of the old arrangement between them and entirely put an end thereto. Appellant had full notice from the notice of set-off filed long before the trial that it should need just the evidence that is said to be found in this contract, to meet appellees' claim that the goods were bought under an arrangement that had been of many years standing.

Now its excuse for not producing it at the trial is not that its agent, who was attending to the trial, did not know of the contract claimed to be the newly discovered evidence, or that it was forgotten by him or other agents of the company, but

that "it was at the time of the trial hereof at the home office of the plaintiff in Newport, Kentucky, and plaintiff was not prepared upon the trial hereof to rebut the defendants' statement," etc. This not only fails to show diligence, but it shows absolute negligence in the preparation for trial by plaintiff's agents. No excuse whatever is shown or attempted, for the failure to inform plaintiff's attorney of the existence of this contract and placing it in his control to meet the appellees' case as they had put it on paper in the notice of set-off.

Negligence such as here appears, it has always been held, will defeat a motion for new trial on the ground of newly discovered evidence. A party moving on such ground "must show that he has been guilty of no negligence in not discovering and producing it upon the former trial. The relaxation of these rules would encourage litigation, and reward ignorance and carelessness at the expense of the opposite party." *Champion v. Ulmar*, 70 Ill. 322.

We think the affidavits made out no such case as required the court below to grant a new trial, and therefore no error was committed in refusing the same.

The judgment will be affirmed.

Judgment affirmed.

THE PENNSYLVANIA COMPANY

v.

PETER BACKES.

Railroads—Negligence—Personal Injuries—Crossings—Failure to Signal—Excessive Speed—Fellow-Servants—Ordinance—Evidence—Preponderance—Instructions.

1. While a jury is required to act on the preponderance of evidence, a preponderance for the appellant is not, in a court of review, ground for reversal.

2. Liability upon the part of railroad companies for failure to give the statutory signal is not limited to injuries caused upon a crossing, alone, but

also attaches where the same occurred within a short distance thereof, but still in the highway along which the tracks are laid.

3. The statute applies to crossings in cities.

4. The statement of counsel in his opening as to a certain matter can not be looked upon as evidence.

5. In an action brought to recover from a railroad company, for personal injuries alleged to have occurred through its negligence, this court declines, in view of the evidence, to disturb the verdict in behalf of the plaintiff.

[Opinion filed February 12, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Mr. GEORGE WILLARD, for appellant.

Messrs. MERRITT STARR and JAMES B. MUIR, for appellee.

GARNETT, J. On December 17, 1887, appellee lost his arm, which he charged in his declaration to have happened through appellant's negligence. He was a laborer in the employ of the Star & Crescent Flour Mills Company. The mill of the company is situated at the southeast corner of Randolph and West Water streets in Chicago, the west line of the building being flush with the east line of West Water street. The structure is 115 feet long, north and south, having adjoining its whole length on the west a wooden shed about twelve feet wide, with openings therein to receive wheat and coal from freight cars. Just west of the shed, at a convenient distance for unloading the cars, is a switch track running from Randolph street south to a point eighty-seven feet north of the north line of Washington street, and at that point the switch track connects with a main track to the west, laid north and south in West Water street. In the switch track, opposite the opening in the shed for receiving wheat from the freight cars, was a scale thirty feet long, which was used to weigh the cars of grain. The scale is 278 feet north of the point where the switch track is connected with the main track. The business of appellee was to assist in moving the freight cars upon the scale (that being necessary at times, when they were left by the switch engine partly or wholly off

the scale platform), and shoveling the wheat from them into the shed. On the trial of the case evidence was given tending to prove these facts: that in the forenoon of the day named five cars were standing on the switch track, the north one being empty, the next two loaded with wheat, the next one empty, the next one loaded with coal, but none of them being coupled together. The situation of the cars was such that the wheat cars could not be unloaded until the empty cars were switched out, and so Scanlan, the foreman of the mill hands, told Laycock, the foreman of appellant's switching crew, that they were blocked up, and asked him if he "would make a switch for him—throw out a couple of cars." Laycock asked him if the men had quit work, and he said they had. As soon as the engine came up it was coupled to the switch car and then all five of the cars were coupled; they were drawn through the switch; the north empty car was then detached and left on the main track, and the loaded wheat cars were put in on the switch track. The other empty car was then switched out and left on the main track, and the engine with the coal car run south. While this switching was going on appellee and his two co-employees were inside the mill, but when the wheat cars had come in upon the switch track, Scanlan told the men to come out. Appellee seems not to have heard the order, but seeing his fellow-workmen go he followed them. The two wheat cars stood on the track with a space of about fifteen feet between them, the southernmost lacking about three feet of being in position for weighing. Before beginning to move that car upon the scale, appellee testified that he looked south, and there was no car in sight. In this he is corroborated by the witness Ackert, who testified that after the last empty car was left on the main track, the engine took a run about a block south of Washington street, and by the witness Leonhart, who testified that when they went to work, the track was clear. Supposing the switching was at an end, appellee applied his bar to the northwest wheel of the southernmost wheat car, while his companions were working at the wheels of the other truck. After they had been at work in that way from three to five minutes, the

loaded car of coal, weighing from 50,000 to 60,000 pounds was uncoupled and thrown upon the switch track (unattended by a brakeman), by a kick from the engine, with such force that it struck the car appellee was trying to move, and sent it against the other wheat car. By the collision, appellee's arm was thrown between the cars and crushed so that amputation thereof became necessary. The jury found defendant guilty and assessed the damages at \$6,000. Judgment was rendered thereon, and defendant appeals.

Appellant insists that it is not chargeable with negligence in this case, because Laycock and his men were acting in obedience to appellee's foreman, who had stated that the mill hands had quit work. The argument is that it was reasonable for the switching crew to suppose the workmen would not resume work without first giving notice to the switchmen of their intention so to do, and as no such notice was given, appellee proceeded at his own peril (so far at least as the appellant is concerned), if the switching was done in the usual way. Whether it was done in the usual way is a point upon which there is a conflict in the evidence. But conceding that it was done as usual, there is one feature of the case which this argument neglects. The request of Scanlan was to "make a switch for him—throw out a couple of cars." What was meant by that was left for the jury to spell out. But the most reasonable construction is that it was a request to separate the two loaded wheat cars from the rest of the train, and leave them on the switch track where they could be conveniently unloaded. If that was the meaning, the service asked for was completed before the coal car was kicked in. That was the understanding of Scanlan at the time, for as soon as the wheat cars came up he told the men to go to work. It is not probable he would have ordered them to work in a post of such manifest danger if he had supposed the switching was not at an end. By his order to them he said, as plainly as though the words had been spoken, "I ordered a couple of cars switched in. The work is done and you can now safely go to work." Then the disappearance of the engine and coal car was a circumstance which Scanlan might well rely upon as

indicating that Laycock understood his order in the same way and so had hauled the coal car to some other place. Whether that car was loaded with coal for the mill does not distinctly appear from the evidence. The fact that it was on the switch with other cars whose contents belonged to the mill company, could, at most, only raise a presumption that it belonged there. But there is nothing whatever to show that Scanlan or any of his men had any notice that the coal was intended for the mill. They may have supposed that it was there merely for convenience of the railway, and that the company had taken it to its proper destination.

If the order was to switch in a couple of cars for unloading, the duty of giving notice of further switching attached to appellant's servant. He knew, or could easily have ascertained, which of the cars were loaded, which were empty, and whether he was expected to bring back the coal car. If he intended to bring it back, without being requested to do so, he should have given notice of his intention.

The evidence also tends to show that at the time of the injury to appellee the speed of the coal car over the switch track exceeded six miles per hour, contrary to the ordinance of the city of Chicago, and that the engine bell was not ringing at the time of the injury. Appellant says that an examination of the evidence will not show a preponderance of evidence in appellee's favor on these points. A jury is required to act on the preponderance of evidence, but in a court of review a mere preponderance of evidence for appellant is not ground for reversal. The relations of the parties were such, in this case, that the appellant insists Backes and itself were fellow-servants of the mill company, and that no employe is liable in damages to a co-employe of the same master, for injuries received through defendant's obedience, in the usual manner, to the master's directions. If the proposition is true, the assumption that the coal car was switched in the usual manner is one of its necessary elements, and the evidence bearing on the point is conflicting, thereby leaving the verdict of the jury conclusive against appellant on this question of fact. To cover this point, appellant asked the court to instruct the jury as follows:

"The jury are instructed that the plaintiff, in undertaking the work for the Star & Crescent Mills Company, and therein to work on the side-track of said company, assumed himself all the risk of the injury while working in that capacity, which existed when the business was carried on in the usual and ordinary way," which the court modified by writing at the end thereof the words, "and with reasonable care." With that addition no fault can be found. The work might have been done in the usual way and still may have been in reckless disregard of life. The usual way may have been to "kick" in the cars when appellant's servants were informed the mill hands were not at work. But there is no evidence tending to prove that it was usual to "kick" a car in after all the switching requested had been done. The mechanical execution of the work may have been in the usual manner, and still it may have been untimely. If the car was sent in without notice, when notice should have been given, the jury should not have been instructed so as to excuse appellant, without reference to its own neglect.

The declaration consisted of four counts, the first charging defendant with running the car at a high and unlawful rate of speed, and with negligently driving the same against the plaintiff; the second charging the defendant with a violation of that section of the statute which requires blowing of the whistle or ringing of the bell at a distance of eighty rods from highway crossings; the third charging a violation of the city ordinance in failing to ring the bell or blow the whistle, and the fourth charging that the coal car was running at a greater speed than six miles an hour, contrary to the city ordinance. The court instructed the jury, at request of plaintiff, that if they believed from the evidence that plaintiff, without fault or negligence on his part, was injured by the wrongful acts of defendant, as alleged in the declaration, they should find defendant guilty. Appellant complains of this instruction, because it says that the jury were thereby authorized to find a verdict under either the second, third or fourth count, but that the evidence shows neither the statute nor the ordinances apply to the facts of this case. Two points are made

against the application of the statute: 1. That the injury to appellee did not happen on the Randolph street crossing. 2. That the crossing is made by means of a viaduct, and so the statutory signals are dispensed with. In fact, the evidence tends to prove that appellee was within a very few feet of the south line of Randolph street when his arm was caught. We think it will not do to say that the statute furnishes no protection to one who is a trifling distance to one side of the crossing, but still is in the highway along which the tracks are laid. That liability for failure to give the statutory signal is not limited to injuries caused upon the crossing, is shown by the case of *Norton v. Eastern Railroad Company*, 113 Mass. 366; see, also, *Wakefield v. Conn. & Pass. R. R. Co.*, 37 Vt. 330. As to the second point, it is sufficient to say that no evidence in the case tends to prove that the crossing is by viaduct. The statement of defendant's counsel to that effect in opening the case to the jury can not be seriously considered as evidence.

If it be said that the statute does not apply to street crossings in cities, we answer that the contrary has been held by the Supreme Court of Illinois, in *Mobile & Ohio R. R. Co. v. Davis*, 129 Ill. 146.

That appellant was bound to obey the city ordinances at the time and place in question, we perceive no reason to doubt. Its tracks, where the injury occurred, were in a public street. Appellee was rightfully there. Such portion of the street as was not occupied by the tracks and cars was still a public highway, free to all persons. And in the case of appellee, under the circumstances shown by the evidence, he must be regarded as having implied license from appellant, so far as such license may have been necessary, to be where he was for the purpose of performing his duties. In cases of this character, to slacken the requirements of the ordinance, which imposes the duty of continuous ringing of the bell within the city limits, would leave scant security for the lives of those who are situated as appellee was when he was hurt.

Counsel for appellant complains of the second instruction given for plaintiff, on the ground that it sums up all or a num-

ber of the facts which the evidence tends to prove on one side, and omits all on the other side. Just what he thinks should have been added to the instruction is not stated in his brief, and upon examination of it, we think it free from any reasonable objection.

We do not wish to be understood as conceding that the facts stated in this opinion created the relation of fellow-servants of the mill company, between appellant and appellee, or that appellant was not required to exercise ordinary and reasonable care in switching the cars, although the service was requested by the foreman of the mill hands, and the work may have been done in the usual manner and at the proper time.

The judgment is affirmed.

Judgment affirmed.

THOMAS LORD ET AL.

V.

MARY E. OWEN.

Contracts—Conditions—Breach — Construction — Evidence—Experts—Damages.

1. Expert evidence should not be received as to the meaning of a condition in a contract, to understand which no previous study or habit is necessary.

2. In an action brought for the recovery of damages for the breach of a contract relating to the manufacture and sale of a patent medicine, this court holds, in view of the introduction of improper evidence, touching the meaning of a certain term therein, and as a basis for estimating damages, evidence as to the sales and profits before the making thereof, that the verdict for the plaintiff can not stand.

[Opinion filed February 12, 1890.]

APPEAL from the Superior Court of Cook County; the Hon.
JOHN P. ALTGELD, Judge, presiding.

Lord v. Owen.

Mr. HARVEY B. HURD, for appellants.

Messrs. WILLIAM H. SISSON, C. F. GOODING and WILLIAM D. COPPERNOLL, for appellee.

GARNETT, J. Appellee sued appellants in assumpsit to recover damages for the breach of a contract, dated July 4, 1876, the result being a verdict and judgment for \$6,000 against appellants, which they now seek to reverse. Appellants are wholesale druggists, carrying on their business in Chicago, and by the contract sued on, appellee sold to them the sole right for ten years to manufacture and sell a patent medicine known as "Owen's Compound Fluid Extract of Buchu," of which appellee was proprietor. They agreed to manufacture the medicine from a receipt furnished by appellee, put up in bottles made from a certain mold, wrap the bottles in circulars printed from stereotyped plates to be furnished by appellee, to advertise and sell the medicine as "Owen's Fluid Extract of Buchu," vigorously push the manufacture and sale of the medicine, using all necessary and proper means to that end, and pay appellee \$12 for each gross of bottles sold. It was also agreed that upon the failure of appellants to keep their part of the agreement, all rights thereby granted should cease, and on the expiration of the agreement appellants should return the plates, mold and receipt to appellee in as good condition as when received.

This suit was brought by appellee after the expiration of the ten years, the declaration charging that the defendant did not put up and sell the medicine in bottles made from the molds furnished them by the plaintiff, and did not vigorously push the manufacture or sale of the medicine, and did not return to the plaintiff the stereotyped plates, molds or receipt. Other breaches are alleged, but not insisted on by the plaintiff.

On the trial the plaintiff was permitted, against the objection of defendants, to introduce in evidence the opinions of witnesses as to the meaning of the phrase, "Vigorously push." A wholesale druggist, called as a witness by appellee, testified that one of the ways of "vigorously pushing," is advertising in

the newspapers. A newspaper advertising agent testified that his construction of the contract would be to advertise freely in the papers. Both of these witnesses admitted that advertising patent medicines in newspapers was not a custom, but depended on the agreement of the parties. There was no evidence that the phrase was used in any business, or that it had a technical signification, nor do the witnesses appear to have had any better qualification for interpreting it than the jury. To understand its meaning no course of previous study or habit was necessary. In such cases expert or opinion evidence should not be received. *Linn v. Sigsbee*, 67 Ill. 75; *City v. McGiven*, 78 Ill. 347; *Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153; *Reid v. Piedmont & A. Life Ins. Co.*, 58 Me. 421.

The admission of this evidence was error. The defendants did not pretend to have used the newspapers as an advertising medium.

The court also erred in allowing evidence to be given for plaintiff, to the effect that, previous to 1876, the medicine had been advertised by posters, and printing on the sides of walls and fences, and in books, fancy cards, tin signs, card and board signs, nailed up, and on banners carried around the street by boys. The reasonable inference from the admission of this evidence was, that the court regarded that kind of pushing as a "proper means to that end," and as the defendants did not pursue the same course, the conclusion was easily reached that they had broken their contract. For the purpose of furnishing a basis to estimate the damages, the plaintiff offered evidence of the amount of sales of the medicine, and profits thereon, before the contract in suit was made. The evidence was objected to by the defendants, the objection was overruled, and they excepted. No other evidence could have been relied upon by the jury in returning a verdict for \$6,000. The law does not recognize that method of estimating damages. "Past success in the same, or a similar enterprise will not do. Conditions may not always be the same." *Union Refining Co. v. Barton*, 77 Ala. 148; *Masterton v. Village of Mt. Vernon*, 58 N. Y. 391; *Hair v. Barnes*, 26 Ill. App. 580.

Miller v. Scoville.

The only substantial damage proved was in the failure to return the stereotyped plates. Their value was proven to be \$34 only, and beyond that, we are unable to discover anything in the record to support a verdict for substantial damages. The amount found by the jury is oppressive and is manifestly built upon the theory that the defendants were required by the terms of their contract to use the newspapers freely, and to employ the various other methods of advertising described by plaintiff's witnesses. Had they done so, the conjecture was that the sales would have been large enough to pay the sum of \$6,000 as royalty to the plaintiff, over and above what she actually received. But as the law demands something more definite than guessing in such cases, the judgment must be reversed and the cause remanded for a new trial.

Reversed and remanded.

JAMES E. MILLER ET AL.

v.

E. T. SCOVILLE ET AL., FOR USE, ETC.

Garnishment—Where Amount is Payable upon Certificate of Another—Failure to Produce—Waiver.

1. The contingency that will render a debt not garnishable must be one that affects the debt itself, and not the amount of it, or the time or manner of payment.

2. Where all that remains to be done is to make such calculations as are necessary to ascertain the amount due, the indebtedness is sufficiently certain for the purpose of garnishment.

3. Upon an appeal from a judgment against a certain firm as garnishees, it being contended by it that a given percentage of the contract price was not under a contract duly entered into, to be paid the attachment debtors until the engineer of the railroad in question should certify in writing that their work was completed, this court holds that the debt which was owing from the garnishees under the contract referred to was liable to garnishment notwithstanding the fact that at the date of filing its answer the certificate from the engineer had not been presented, and furthermore that the production thereof was duly waived by certain acts of the garnishees.

[Opinion filed February 19, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

MESSRS. SMITH & PENCE and JOHN MAYNARD HARLAN, for appellants.

Mr. W. W. GURLEY, for appellees.

MORAN, J. This is an appeal from a judgment rendered against appellants as garnishees. Appellants, constituting the firm of Miller, Loomis & Gill, had entered into a written contract with the firm of Scoville, Warkley & Melville, the attachment defendants, for certain work to be performed by the latter firm on the Chicago, Santa Fe & California Railroad. From the garnishees' answer, which was filed January 4, 1888, and stated said contract in effect, it appeared that it was agreed that Miller, Loomis & Gill should retain out of the amount earned on the contract ten per cent of the same until the contract should be completed, and the engineer of the railroad should so certify in writing, and that the engineer had not, at the time of filing said answer, certified in writing or otherwise that said contract had been completely performed on the part of said attachment defendants. On the trial it was shown that the work provided for in said contract was completed in December, 1887, before the commencement of this action, and that there was then owing therefor to the attachment defendants \$8,812.39, for which, however, no final estimate of the engineer was made, until April 20, 1888. No certificate of the engineer that the work had been completely performed, was ever made out or presented to the garnishees. Judgment went against the garnishees for the amount above stated, and it is now contended, as a ground for reversal, that at the date of the service of the attachment writ, and of the filing of the answer, the claim of the attachment defendants against the garnishees was of so uncertain and contingent a nature, that it was not subject to garnishment.

The contingency, it is argued, which was to render the debt due and certain, was obtaining the engineer's certificate that the contract was performed, and until that was produced it could not be known that appellants were indebted at all. The vice in that argument lies in the assumption that the certificate of the engineer created the debt from appellants to the firm which executed the work. The words of the contract relating to the final payment are, "party of the second part hereby agrees that whenever this contract shall be completely performed on the part of the said party of the first part, and the engineer has certified the same in writing, the said party of the second part shall, within ten days thereafter, pay to the said party of the first part any remaining sums due for the said work according to this contract." This makes the certificate relate to the time when the debt shall be discharged; not to the creation of it. The performance of the work under the contract created the debt between the parties, but its collection by action might not be enforced till the certificates should be produced, or a legal excuse for its non-production shown. The contingency that will render a debt not garnishable must be one that affects the debt itself, and not the amount of it or the time or manner of payment.

The attachment defendants might not be able to maintain an action to recover the money, because, though the debt existed, the event had not yet happened which made it *due*; but the right of garnishment extends not only to debts due, but to debts "which shall thereafter become due," that is, become due after the service of the writ. Now, in this case it is clearly shown that the work was completed. There had been no estimate to definitely fix the amount earned, but it is not contended that would relieve the debt from garnishment. All authorities agree that where that which remains to be done is only to make such measurements or calculations as will ascertain the amount, the indebtedness will be regarded as sufficiently certain for the purpose of garnishment. Now, suppose that the answer in this case had stated the exact facts as they existed at the time it was filed, *i. e.*, that the work mentioned in the contract had been completed, that the money

to be paid therefor had been earned by the attachment defendants, but that said money was not yet due or payable for the reason that the engineer's certificate that the work was completed had not yet been presented, and the garnishees were unable to say when it would be; could it be fairly contended that on such an answer the garnishees should be discharged? If so, the principal debtor could, in all such cases, easily defeat the garnishing creditor from subjecting money earned under the contracts containing similar provisions, to the payment of his debt, by simply omitting to obtain the required certificate.

It must be noted that the work is admitted to have been done. A refusal of the certificate, if applied for, would be unreasonable, and constitute such fraud as would authorize a judgment without the certificate; then is it not more reasonable to say that the debt may be shown to be due by showing a waiver of the certificate, or that it is unreasonably withheld, and that the debt itself is not affected by such certificate, but only the time of payment?

While it may be true, as counsel contends, that the liability of the debtor is no greater as garnishee than in a suit by his creditor against him, yet this proposition is to be understood as having reference to the nature of the indebtedness. By the statute, garnishee proceedings will tie up a debt and render it subject to the attaching creditor's lien when due, which could not be sued for by the principal debtor, because, in order to maintain *his* action the debt must be wholly due.

Where a contractor had done work, the payment for which, by the terms of the contract, was to be made on the estimate and certificates of an engineer, and then nothing further to be done by the contractor to entitle him to be paid, it was held that the fact that the engineer's estimate and certificate had yet to be made, was not a contingency which prevented the party for whom the work was done from being charged as garnishee of the contractor. *Ware v. Gowen*, 65 Me. 534; *Drake on Attachment*, Sec. 552.

We conclude, therefore, that the debt which was owing from the garnishees under the contract in this case was liable to garnishment notwithstanding the fact that at the date of

Conwell v. Inderrieden.

filing the answer the certificate from the engineer had not been presented.

The evidence shows that subsequent to the filing of the answer, and prior to the trial, the garnishees offered to pay the amount due to the principal debtor without the production of the certificate from the engineer that the work had been completed. This, taken in connection with other circumstances shown by the evidence, justified the trial judge in finding as he did, that the production of the written certificate was waived. The finding and judgment of the trial court were in accordance with the facts and the law, and will therefore be affirmed.

Judgment affirmed.

LEWIS A. CONWELL
v.
JOHN B. INDERRIEDEN.

Sales—Evidence—Weight of—Practice—Judgment.

1. In the examination of alleged errors in findings by trial courts, courts of review will be bound thereby unless it can be seen that the same are manifestly against the weight of the evidence.
2. Where no question of law intervenes, the finding of a judge in a trial at law, where the evidence is conflicting, stands just as a verdict of a jury where there have been correct instructions.
3. This court does not fail to examine the evidence in records in cases of this character.

[Opinion filed March 10, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Messrs. RICH & STONE and W. J. DURHAM, for appellant.

Messrs. PECKHAM & BROWN, for appellee.

Per Curiam. This action was brought to recover for certain canned pumpkin known as "Wyoming Pumpkin." The case was tried by the court without a jury, and as the court

held all the propositions of law requested by appellant, the question presented here is purely one of fact.

There is a conflict of evidence between appellant and appellee as to what occurred when a sample can of the goods in controversy was exhibited to defendant and also conflict as to whether one Steimer, in directing the goods to be shipped from Philadelphia to appellee at Chicago, was acting as the agent of appellant or of appellee; and there is a conflict of evidence as to the quality and value of the goods shipped. Appellant strenuously argues that on all these issues the preponderance of the evidence is with him, and that the court below found the facts incorrectly.

The invariable rule which controls courts of review in examination of alleged errors in findings by the trial court is, that the finding by the trial judge is conclusive unless it can be seen that it is manifestly against the weight of evidence. Where no question of law intervenes, the finding of a judge in a trial at law where the evidence is conflicting, stands just as a verdict of a jury where there have been correct instructions. Now, if this case had been tried by a jury, and counsel could find no fault with the instructions given by the court, they would hardly argue that the verdict was not supported by the evidence. When we say that we are bound by the finding of the trial court where the evidence is conflicting, and the evidence does not clearly preponderate against the finding, it must not be understood that we do not examine the evidence contained in the record with care. We have carefully read and considered the evidence in this case, and so far from reaching the conclusion pressed upon us by counsel, that the court found contrary to the facts, we are led to the opinion, the finding of the court upon all the issues of fact is in accordance with the evidence, and fairly and fully supported by it.

Without, then, in this case, applying the rule as to the presumptions in favor of the finding of the trial court, but upon our own conclusions on the evidence, we are compelled to affirm the judgment.

Judgment affirmed.

Kraemer v. Leister.

EDWARD KRAEMER

v.

GUSTAV LEISTER.

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Master and Servant—Contract of Service—Wages—Recovery of—Default—Motion to Set Aside—Affidavit—Propositions of Law.

1. It is proper after judgment to refuse a proposition of law.
2. In an action brought to recover a balance claimed to be due on account of wages, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff.

[Opinion filed March 10, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

Messrs. RUBENS & MOTT, for appellant.

Messrs. KRAUS, MAYER & STEIN, for appellee.

GARNETT, J. This action was commenced before a justice of the peace, on this agreement:

“Articles of agreement made between Edward Kraemer, party of the first part, and Gustav Leister, party of the second part, both of the city of Chicago, county of Cook and State of Illinois. In consideration of the sum of one dollar in hand paid by Gustav Leister to said Edward Kraemer, the said Edward Kraemer promises to pay to the said Gustav Leister the sum of \$400 one year after date hereof, and \$200 one year and six months after the date hereof. The said Gustav Leister agrees during one year after the date hereof to assist and attend faithfully to the business of the said Edward Kraemer according to his direction. In witness whereof both parties have signed their names hereto. Given Chicago, May 11, A. D. 1887.

“EDWARD KRAEMER,

“GUSTAV LEISTER.”

The action was brought by appellee May 23, 1888, to recover a balance of \$135 remaining unpaid on the \$400 installment. An erasure appeared upon the face of the paper, but it was admitted in evidence upon the testimony of appellee that such erasure was made before the execution of the instrument. Two defenses were set up: 1, that upon an accounting between the parties, after the making of the contract, there was found to be due appellant from appellee, on other transactions, the sum of \$346.50; 2, that the contract when signed, required appellee to work for appellant one year and six months from its date; that the words, "and six months" had been erased by drawing over them heavy ink lines, after the execution of the contract, without appellant's knowledge or consent, and that appellee wrongfully left appellant's service at the expiration of the year.

There was a judgment before the justice in appellee's favor, from which Kraemer appealed to the Circuit Court. While pending there, a judgment was entered against appellant, no defense being made by him. To induce the court to set aside that judgment, appellant made and filed an affidavit setting up the particulars of his defense. The judgment was set aside and the case subsequently tried by the court without a jury and judgment given for appellee.

In the affidavit no mention was made of the erasure in the instrument sued on, nor of any agreement by appellee to serve appellant for eighteen months; and in setting forth therein the items of the account between the parties, only one item of appellant's credits agreed in amount with what he testified to on the trial in the Circuit Court, and that item appellee himself admitted. The total of the credits claimed by appellant in his affidavit was \$173.50 less than the total testified to by him at the trial.

In giving his evidence, his efforts at explanation related solely to the items of the alleged account, but he made no explanation of his failure to state in the affidavit that there had been an agreement for eighteen months' service and that the written contract had been altered so as to reduce the time to one year. Clearly the production of the affidavit imposed

Baldwin v. Ferguson.

upon appellant a heavy burden. Whether his attempt to explain these widely divergent statements was successful or not was a question for the trial court, and with its determination thereof we are not disposed to interfere. What appellant relies upon as corroborating evidence we think not sufficient to warrant any different conclusion.

The proposition of law which was submitted by appellant to, and refused, by the court, was not submitted until after judgment rendered. The statute only permits such propositions to be submitted upon the trial. After judgment it is no error to refuse a sound proposition of law. The judgment is affirmed.

Judgment affirmed.

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GEORGE F. BALDWIN ET AL.

v.

J. Q. FERGUSON ET AL., FOR USE, ETC.

Attachment—Garnishment—Affidavit—Bond—Judgment—Action.

1. The requirements of the statute concerning attachments, that notice to a defendant upon whom personal service can not be had, shall be published in a newspaper, and a copy thereof mailed to him, are jurisdictional, and the record must affirmatively show jurisdiction where it is based upon publication, or it is void collaterally. Mailing in such cases is as indispensable as the publication.

2. An affidavit setting forth that a defendant's residence two years before the making thereof, was at a place from which he had departed, is no evidence that his residence is there at the time the affidavit is made.

3. A judgment is void as to a person made a party defendant to attachment proceedings subsequent to the institution thereof, an amended affidavit, but no bond, being filed.

4. The fact of the release by a defendant of all errors that intervened touching a void judgment against him, can not operate to bind a garnishee whose liability, being statutory, is not dependent upon the favor of defendant.

5. Credits due to several persons jointly can not be recovered in proceedings against a part of them only.

6. However numerous may be the defendants in an action, the steps by which jurisdiction over them respectively is obtained, are several as to each.

[Opinion filed October 23, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. DUPEE, JUDAH & WILLARD, for appellants.

Mr. D. M. KIRTON, for appellees.

GARY, J. This is a suit commenced by Carr against Ferguson et al., in attachment, and the appellants were summoned as garnishees. The court, trying the case without a jury, found that the appellants were indebted to the appellees, and rendered a judgment accordingly for the use of Carr.

As the judgment is to be reversed upon other grounds, it is not now necessary to inquire whether the evidence supports the finding. The original affidavit was filed October 11, 1886, and alleged that Neeld, one of the appellees, resided at Chicago, in the county of Cook, and had departed from the State.

October 2, 1888, under leave to make Goodbody, one of the appellees, a defendant in the suit, which before he had not been, an amended affidavit for attachment was filed which repeated the allegation that Neeld had departed from this State, and also alleged that "his place of residence at the date of the issuing of the original writ was Chicago, Ills."

No new bond was then filed. The writ of attachment which was then (October 2, 1888,) issued, was therefore issued upon an affidavit which stated where the residence of Neeld was two years earlier, and without any bond as to Goodbody. We all agree that the court had no jurisdiction to enter, as it did, judgment by default against Neeld.

It is necessary under the statute, Sec. 22, Attachments, that notice to a defendant upon whom personal service can not be had, shall not only be published in a newspaper, but a copy of the notice must be mailed to him. Both of these prerequisites are jurisdictional. *Thormeyer v. Sisson*, 83 Ill. 188. And the record must affirmatively show jurisdiction, where it

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is based upon publication, or it is void collaterally. *Haywood v. Collins*, 60 Ill. 328. When the statute adds mailing to publication, one is as indispensable as the other. *Werner v. Werner*, 30 Ill. App. 159.

The record proper is silent as to whether a notice was mailed to Neeld or not, but on the trial of the issue between the appellees and appellants there was evidence of such mailing to him at Chicago. Now the probability that a defendant will receive a notice mailed to him at his place of residence is much greater than that he will see a notice published in a newspaper at another place, and an allegation in an affidavit that his residence two years earlier was at a place from which he had departed, is no evidence that his residence is there at the time the affidavit is made.

The principle on which *Campbell v. McCahan*, 41 Ill. 45, and *Foster v. Illinski*, 3 Ill. App. 345, were decided, makes such an uncertainty fatal.

The majority of the court are also of the opinion that the judgment as to Goodbody was void, because as to him there was no bond. "Every attachment issued without a bond and affidavit taken, is hereby declared illegal and void, and shall be dismissed." Sec. 5, Attachments.

However numerous may be the defendants in an action, the steps by which jurisdiction over them respectively is obtained are several as to each. The subjection of each to the action of the court depends upon what has been done as to him, and not upon the standing which others may have. If the proceedings which touch him would have been void had he been sole defendant, they are not validated as to him by their effectiveness as to others. The provision in Sec. 28 of the act for amendment in case of "insufficiency" of the bond, does not extend to a case of no bond at all. After judgment in the original action by Carr against the appellees, by leave of the court a new bond was filed by Carr, in which Goodbody was one of the obligees; but if the view above stated is correct, such action was of no avail.

At the second term after the judgment was entered against the appellants, Neeld appeared in the Superior Court, and

released all errors that might have intervened in entering the judgment against him six months before.

What might be the effect of this between him and Carr it is not necessary to consider. But the liability of the appellants, if any there be, as garnishees, is statutory, and not dependent upon the favor of Neeld toward either of the parties.

If the judgment against Neeld was void, no act of his could make it binding. "A confirmation of a void thing avails nothing." See authorities cited in *Wurster v. Reitzinger*, 5 Ill. App. 112.

The want of jurisdiction over Neeld and Goodbody, the appellants had a right to insist upon. *Pierce v. Carleton*, 12 Ill. 358; *Empire Co. v. Macey*, 115 Ill. 390.

Such want of jurisdiction over them made the judgment of Carr against all the appellees, in effect, a judgment only against the appellees other than Neeld and Goodbody. Credits due to several jointly can not be taken on proceedings against only a part of them. *Drake Att.*, Sec. 567 *et seq.*; *Waples Att.* 205.

The garnishee would not be protected, even by payment under such proceedings, against a subsequent suit by all the joint creditors. *Hawes v. Waltham*, 18 Pick. 451.

The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

UNION NATIONAL BANK OF CHICAGO

v.

JOHN W. GOETZ ET AL.

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41	143
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138	127
35	396
50	393

Insolvency—Partnership—Banks—Establishment of Credit—Fraudulent Statements—Trust Fund—Confusion—Identification—Practice—Jurisdiction.

1. Before equity can charge as trustee one who has obtained title to goods from the vendor by fraud, not only must the fraud be shown, but it must also appear that the parties are in such a situation that a rescis-

sion of the fraudulently induced contract can be effected. The effect of a rescission must be to restore the *status quo*.

2. Where goods can not be reclaimed through the intervention of rights of third parties, or the identity thereof has been lost, the vendor is not confined to the terms of the fraudulent contract for a remedy, but may disregard the same and recover damages for the consequences of the fraud as a substantive cause of action, and where money is obtained by fraud or under a fraudulent contract, it may be recovered at law in an action for money had and received, and the facts which will prevent the deceived party from reclaiming the title to goods at law, will prevent him also in equity, and unless the goods can be identified in the hands of the vendee, or the money can be clearly and distinctly traced, conditions do not exist which permit the resumption of title by the defrauded party, and authorize a court of equity to restore the goods or money as property the title to which never passed, and which the perpetrator of the fraud held as trustee for the defrauded.

3. In such cases the jurisdiction of courts of law and courts of equity is concurrent, and the principles upon which they proceed is identical.

4. Upon a bill filed for a specific lien upon the general assets of an insolvent firm for money loaned upon alleged fraudulent representations made by it from time to time as to its business, for the purpose of establishing a credit, the bill declaring that the fund in question can not be identified or traced, this court declines, in view thereof, to interfere with a decree denying the relief prayed.

[Opinion filed March 10, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

A bill was filed by John W. Goetz against his partner, Louis W. Reiss, asking for a dissolution of partnership and a winding up of the firm affairs, the firm being insolvent, the appointment of a receiver, etc. A receiver was appointed, and on the application of the Union National Bank it was made a party to the suit with leave to answer and file a cross-bill. The cross-bill filed alleges in substance as follows:

That on January 22, 1888, the defendants Goetz and Reiss were and for a long time prior had been partners in business in the city of Chicago, under the firm name of John W. Goetz & Co., and that the complainant during the same time was and still is engaged in the business of banking, and is a corporation organized under the laws of the United States,

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known as the National Bank Act; that on January 23, 1888, said Goetz & Co., for the purpose of establishing a credit with said bank and of inducing it to loan to said firm money from time to time as desired by them, represented and stated in writing to said bank as follows:

“CHICAGO, ILL., January 23, 1888.

John W. Goetz & Co., of Chicago, County of Cook, State of Illinois, for the purpose of obtaining a credit with the Union National Bank of Chicago, Ill, do make the following statement and representations of our present true financial circumstances, wealth and mercantile respectability, which said representations shall be the basis of our credit with the Union National Bank, both for our present credit and for all credits for and during the period of two years from this date, agreeing to immediately notify them of any material change in or of our business matters during the period above mentioned. In case of failure or insolvency, it is agreed that all notes shall be considered then due. A co-partnership of John W. Goetz and Louis W. Reiss.

ASSETS.

	Amount.
Stock of goods on hand at value.....	\$114,000.

LIABILITIES.

	Amount.
For merchandise not to exceed.....	\$ 8,000.
For borrowed money.....	15,000.

(Signed) JOHN W. GOETZ,

For J. W. G. & Co.”

Whereby said bank and its officers were informed by said firm that their capital was \$91,000 over and above all liabilities.

That at various times since that date, said John W. Goetz & Co. have for the same purpose made to said bank oral statements of their financial condition, all of which were to the effect that they were doing a large and profitable business, and were rapidly increasing their net capital as shown by said written statement, the last of these statements being made on the first day of April, 1889. That relying upon this

Union Nat. Bk. v. Goetz.

statement of January 23, 1888, and the subsequent confirmatory statements so made, and believing them to be true, said bank gave to said John W. Goetz & Co. a line of credit for money loaned from time to time, and among others loaned to them the following named sums at the dates stated, to wit:.

February 14, 1889.....	\$2,500
February 20, 1889.....	5,000
March 8, 1889.....	5,000
April 1, 1889.....	2,500

Amounting to the sum of \$15,000. Upon the loan first above stated, there has been credited the sum of \$524.10, leaving the amount still due from said firm to said bank the sum of \$14,475.90. That the statements so made by Goetz & Co. to said bank were false and fraudulent when made, and well known by them to be false and fraudulent. That in fact the defendants at the time of making said written statement, did not have on hand a stock of goods of the value of \$114,000, and owed in fact for merchandise many thousands of dollars far in excess of \$8,000, and many thousands of dollars for borrowed money in excess of \$15,000, and were in fact at all times insolvent, by means of which said false and fraudulent representations said bank was deceived, cheated and defrauded, and so continues to be, and said defendants came into possession of the money so obtained by fraud.

That having acquired said money by such fraud, the defendants became and still are trustees of the cross-complainant in respect to the same, and accountable for said moneys, either *in specie* or in whatsoever else they placed or invested it. That said trust funds were by said defendants invested and paid out from time to time for merchandise which was by them brought into their store on State street, in the city of Chicago, and there so mixed and commingled with other merchandise, bought with other funds, or procured by other means, that the cross-complainant is now unable to identify the same, but avers that said merchandise, so purchased and paid for by said trust funds, or other merchandise bought with the proceeds thereof, to which said trust also attached, were in the store of said defendants when the same was taken

possession of by the receiver, as hereinafter mentioned, and passed into his possession and so remain, unless disposed of by said receiver, in which case the proceeds thereof are in his hands, subject to said trust.

That J. S. Huey was appointed receiver upon April 10, 1889, under the original bill, and now has the custody and control of the property and effects of said firm. That by reason of the facts aforesaid, the cross-complainant is entitled in equity to pursue said trust money into the property now in the hands of said receiver, and is entitled by reason of the confusion of goods, brought about by said defendants, to a lien upon the whole stock of merchandise now in said receiver's possession, for the restoration of the money out of which it has been defrauded.

Prayer for relief, and that the moneys so loaned by the cross-complainant, and unpaid, may be decreed to have been obtained by the defendants by fraud, and that they may be held liable as trustees of the cross-complainant in respect to the same; that said trust money may be decreed to have been invested by the defendants by successive and continuing transactions in the merchandise now in the possession of the receiver, and to have become by the act of the defendants, so confused with the general bulk of such merchandise that the cross-complainant is entitled to a lien upon the whole for its reimbursement; that such lien and reimbursement may be decreed accordingly, and that in the meantime the receiver be directed to retain all the merchandise which came to his possession, and the proceeds of any that has been sold, to abide the final decree. Prayer for general relief.

Other creditors became parties to the suit, and filed general demurrers to the cross-bill of said Union National Bank, and on argument said demurrers were sustained and said cross-bill dismissed for want of equity, and from said order the appeal is prosecuted.

MESSRS. TENNEY, HAWLEY & COFFEEN, for appellant.

MESSRS. FRANK A. HELMER and KRAUS, MAYER & STEIN, for appellees.

MORAN, J. The facts stated in the cross-bill show that the transactions of the parties created between them the relation of debtor and creditor. The loan was obtained by making false representations; but the fact that the subject of the transaction was money instead of merchandise, permits no distinction as to the principle that is to govern. If, for greater clearness of illustration, we suppose that \$15,000 worth of goods had been obtained from complainants on credit on the same false representations that induced the loan, and that said goods had been sold and the proceeds of them had gone with other funds into the purchase of the stock in the hands of the receiver, so that neither the goods nor proceeds could be identified or traced, further than that the same went in general augmentation of the assets of appellees, it will be readily seen that the condition of the parties would be such that the creditors could not be permitted to change the relation from debtor and creditor to trustee and *cestui que trust*. It is not like the case where the first relation existing between the parties with reference to goods or money is a trust relation, created either expressly or by implication. In such case a court of equity enforces a trust created by the parties, but a trust *ex maleficio* is one raised or constructed by the court upon the acts of the parties where no trust was intended by either party, for the purpose of furnishing to the wronged party a more complete remedy. Now, before equity can charge as trustee one who has obtained the title to goods from the vendor by fraud, not only the fraud must be shown, but it must also appear that the parties are in such a situation that a rescission of the fraudulently induced contract can be effected. A sale of goods or a loan of money, though induced by fraud, vests title to the goods or the money in the vendee or the borrower. The transaction is not void, either at law or in equity, but only voidable, and it is to be taken as valid until rescinded. The effect of a rescission must be to restore the *status quo*. If the party who obtains the goods has disposed of them, and has obtained money or other goods in their place, there can be no rescission at law or, rather, a rescission at law can not operate to restore the title in the goods to the

vendor; but there may be a rescission of the contract so as to allow the vendor to maintain an action for damages for the deceit or fraud practiced upon him. Though he can not reclaim the goods, because the rights of third persons have intervened, or the identity of the goods is lost, he is not confined to the terms of the fraudulent contract for remedy, but may disregard those terms and recover damages for the consequences of the fraud as a substantive cause of action.

So money obtained by fraud or under a fraudulent contract, may be recovered at law, in an action for money had and received. Now by analogy, the same facts which will prevent the deceived party from reclaiming the title to the goods, at law, will prevent him also in equity. Rescission may be his right because the contract was induced by fraud, but unless the goods obtained by the fraud can be identified in the hands of the vendee, or if money was obtained, and that can not be clearly and distinctly traced, and its substantial identity with the money obtained shown, the conditions do not exist which permit the resumption of title by the defrauded party, and authorize a court of equity to decree the restoration of the goods, or money, as property, the title to which never passed, and which the perpetrator of the fraud held as trustee for the defrauded.

In such cases the jurisdiction of courts of law and courts of equity is concurrent, and the principles on which they proceed are identical. A judgment may be obtained at law, and a decree in equity, but they will be for the same thing in substance. In the English courts a decree will go in such case though there is a clear remedy at law. *Ramshire v. Bolton*, L. R. 8, Eq. 294; *Hill v. Lane*, L. R. 11, Eq. 215.

It is thus seen that though fraud in the vendor or borrower may give rise to the equitable *right* of rescission in the vendor or lender, whether equity in applying a *remedy* will impress a trust on the property, and decree its return, depends on the identification of the property in the hands of the vendee, without the attaching of the *bona fide* rights of third persons, or on tracing the fund with certainty and clearness in such manner as that its identity as a separate fund is maintained.

Where the property is in the hands of the vendee, the remedy is complete and adequate at law, and hence there is, ordinarily, no occasion to invoke the aid of chancery; and though, undoubtedly, money has often been obtained by means of false representations as to credit or by other false pretenses, a court of equity is now asked for the first time, as far as we are advised, to construct a trust upon the fraud, and declare a specific lien on all the property of the debtor, upon the allegation that the money by fraud obtained went to the increase of his general assets. The principles on which the court proceeds, does not authorize the maintenance of the bill. Though general statements found in text books are broad enough to give apparent support to appellant's contention, when the authorities cited in support of such propositions are examined, none are found which go the length necessary to sustain the application of the doctrine invoked to the facts of this case. It would be unprofitable to enter upon a discussion of the different authorities that illustrate the extent to which the court will go in aid of a *cestui que trust*.

Where there is a strict trust, *i. e.*, where the relation is created by the act and intent of the parties, or where a fiduciary relation exists between them, some courts have gone the length in the execution of the trust, of giving a general lien on the entire fund of a trustee who had wrongfully mixed the trust fund with his individual property in order to destroy its identity. In such cases the court aids the enforcement of a trust created by the parties and prevents the fraud from defeating the trust, and the remedy of rescission is not necessary to the court's action, there being nothing to rescind. But even in such cases our Supreme Court has refused the relief where the fund could not be followed as a separate and independent fund distinguishable from any other. The *School Trustees v. Kirwin*, 25 Ill. 73, *Wilson v. Kirby*, 88 Ill. 566, and the many cases cited in appellee's brief decided by courts of last resort in other States, show that the view of our own court is sustained by the weight of authority.

This bill does not seek a decree for the amount of money due to the complainant. The relief sought is a specific lien for

the amount due upon the general assets. The bill declares that the fund can not be identified or traced. By that allegation the cross-complainant showed that it was not entitled to the relief. The bill makes a case which would probably entitle the complainant to a judgment at law for the money borrowed, on the strength of the false statements alleged to have been made, as for money had and received, or in an action for deceit, but makes no case for the relief asked in a court of equity.

Decree affirmed.

AUGUST ZOELLNER

V.

LOUISE ZOELLNER.

Divorce—Separate Maintenance—Temporary Allowance—Attorneys' Fees.

Upon the facts presented, this court declines to interfere with an order entered in an action for separate maintenance awarding a temporary allowance for support of the wife, and a sum for solicitors' fees.

[Opinion filed March 10, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Messrs. RUBENS & MOTT, for appellant.

Messrs. FURTHMANN & FITCH, for appellee.

"We are not aware that it has ever been regarded as a prerequisite to obtaining a decree for alimony or solicitors' fees, pending a divorce suit, that the complainant should establish to the satisfaction of the court that she was entitled to a decree for divorce. Where a bill is pending for divorce and the wife is without means to prosecute her suit, and it appears to

the court that the complainant had a probable ground for divorce, it has always been regarded proper for the court to enter an order requiring the defendant to pay solicitors' fees." *Jenkins v. Jenkins*, 91 Ill. 168, citing *Bishop on Marriage and Divorce*, Vol. 2, Sec. 398.

We may add, in passing, that in the case last cited the court, on the hearing of the appeal (the allowance being for solicitors' fees in attending to complainant's case in the Supreme Court), held the evidence insufficient to sustain a decree for divorce. "Yet," the court says, "the facts before the court were, doubtless, sufficient to authorize the court to require the payment of solicitors' fees to enable complainant to present her case fairly in court."

To the same effect as the *Jenkins* case, *supra*, are the following cases: *Brown v. Brown*, 18 Ill. App. 446; *Johnson v. Johnson*, 20 Ill. App. 495; *Wooley v. Wooley*, 24 Ill. App. 433. In *Wooley v. Wooley*, *supra*, after laying down the rule that probable ground for a divorce is all that a complainant is required to show, the court say:

"This probable ground for a divorce was shown upon the hearing of the motion, by the affidavit of appellee herself, and the affidavits of several other persons who were intimate with the family, and well acquainted with the relations that had existed for a long space of time between her and her husband and their conduct toward each other. The fact that a large number of counter-affidavits were filed does not necessarily show the order for alimony was improperly made. The court could not assume, upon a preliminary motion and upon *ex parte* and contradictory affidavits, to determine the issues made upon the bills and answers." Similar language is used in *Umlauf v. Umlauf*, 22 Ill. App. 583.

The case of *Wheeler v. Wheeler*, 18 Ill. App. 333, cited by counsel, does not, in any manner, conflict with the above decisions. On the contrary, it cites and approves the *Jenkins* case *supra*, and reverses an order for alimony because there was a "total absence of any evidence of probable cause for the suit."

There is still another principle which counsel's broad state-

ment of the law does not contain, and which may be material on this hearing, viz:

“That the making of such orders as the one here appealed from is left to the discretion of the court in which the suit is pending, subject to review; but the appellate tribunal is authorized to reverse only where the difference in judgment between the Appellate Court and the trial court is strong and decided.” Foote v. Foote, 22 Ill. 425; Foss v. Foss, 100 Ill. 580; Dooley v. Dooley, 19 Ill. App. 391; Umlauf v. Umlauf, 22 Ill. App. 583.

And we may add here that the Appellate Court of the Second District, in Dooley v. Dooley, *supra*, and this court in Lane v. Lane, 22 Ill. App. 530, construes the language above quoted to mean that an appellate court will not interfere with a *pendente lite* order unless it is very clearly shown that there has been an abuse of the discretion lodged in the court of original jurisdiction.

GARY, P. J. It would be of no benefit to anybody to put in a permanent form, before the public, the petty details of this ill-matched union of an old man and a young wife.

She sues for a separate maintenance. *Pendente lite*, the court awarded her a very moderate temporary allowance for her own support and a small sum for solicitors' fees. From that order this appeal was taken.

Whether her suit will be successful or not can not be, with any certainty, predicted at its present stage. She has the legal right to prosecute it, and as she has no property and he has considerable, he must pay, reasonably, to enable her to present her claims. As was said by this court in Lane v. Lane, 22 Ill. App. 529, this court “could interfere with such an order only where it was affirmatively and clearly shown to be erroneous upon consideration of all circumstances contained in the record.” No such case is shown by this record, and the order is therefore affirmed.

Order affirmed.

JOHN DAVIS AND JOSEPH CRESWELL

V.

PATRICK J. SEXTON.

35 407
64 560

Contracts—Steam Heating Apparatus—Guaranty—Evidence—Instructions—Special Findings—Res Adjudicata.

1. Where a contract is in writing it is for the court to state its meaning, and it is only where there is a doubt as to its proper meaning arising from the ambiguity of the words or phrases used, that the acts of the parties are looked to for aid in the construction thereof.

2. In order that a defendant may protect himself by a previous judgment against the plaintiff, he must show that both suits involved, legally, the same subject-matter.

3. In an action brought to recover certain expenditures made for the repairs to steam heating apparatus, defendants, who put the same into the building in question, having entered into a guaranty to keep the same in working order for three years without expense to the plaintiff, this court holds that a certain instruction given can not be complained of and declines to interfere with the verdict in his behalf.

[Opinion filed March 10, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Messrs. WEIGLEY, BULKLEY & GRAY, for appellants.

Messrs. BRANDT & HOFFMAN, for appellee.

MORAN, J. This appeal is from a judgment rendered in favor of appellee and against appellants for the cost of certain changes and repairs made in a steam-heating apparatus, which had been constructed by appellants for appellee. The principal controversy regards the obligation of appellants under the contract between the parties. The contract provided that appellants should construct and complete the steam apparatus in accordance with plans and specifications prepared by the architect, and to the final acceptance of the

said architect, and also to the final acceptance of appellee, and contained this clause: "And the said first parties guarantee the perfect working of said apparatus for three years from the date of its completion without additional cost to the second party." The specifications contain the following:

"Guaranty. The size of the radiators, supply and return pipes, is left to the discretion of the contractor, and he must guarantee the apparatus to circulate perfectly, without noise at any pressure, and to warm the rooms named at a low pressure to seventy degrees when the outside temperature is ten degrees below zero. Water connection, boiler house and chimney will be furnished by the owner."

The evidence introduced on the trial in behalf of appellee tended to show that many portions of the building could not be properly heated by the apparatus, that the pipes were noisy and that the cracking or clicking of the steam passing through them was almost constant when they were in use; that the pipes and radiators froze and burst and that water leaked from them into the rooms. In December, 1884, which was the first winter after the completion of the work, appellee wrote to appellants stating the defects in the operation of the apparatus, and gave them notice to put it in order in accordance with their contract. Appellants took no steps to remedy the difficulty, and in January, 1885, appellee engaged another firm of steamfitters to examine the apparatus, and it was found that the trouble was principally caused by a defect in the original construction of the apparatus in failing to have the return pipes enter the boiler a proper distance below the water line in the boiler. This defect in the apparatus was corrected, and the jury found a verdict in appellee's favor for the amount of cost of such work.

Appellants complain that an incorrect construction was placed on the contract in the court below; that it was in effect held that appellants were bound not only to construct an apparatus that would work perfectly in the respects mentioned in the contract, but that they were bound to keep said apparatus in such perfect working order for the period of three years, whether the change or repair to be made was due to defect in original construction or not.

The court did instruct the jury that under the contract sued on, the defendants guaranteed the perfect working of the heating apparatus by them put into the building, for three years from the completion of said apparatus, without additional cost to the plaintiff. It is difficult to see how the court could have refused to so instruct the jury. The words of the instruction are substantially the words of the contract. As used in the contract the words are plain and unambiguous and bind the appellants to do just what such words imported, taken in their ordinary acceptation, and we know of no other words which the court could have used which would convey to the minds of the jury so clear a statement of appellants' obligations, as those words of the contract. We find nothing in any other part of the contract that modifies the import of these words, or that would authorize an attempt to restrain or change their meaning or effect. Neither this instruction or any other given by the court, nor any ruling of the court, to which our attention has been called, construed the contract as obliging appellants to repair faults in the apparatus not due to original defective material or construction.

The contention that the court went on the theory that appellants were bound to keep the apparatus in perfect order for three years, regardless of whether the repairs were made necessary by the improper use by plaintiff, or the carelessness of his servants, is not supported nor justified by the record. Appellants were to "keep" the apparatus in repair for three years, in the sense that they were, without cost to plaintiff, to remedy any defects in it due to its construction or material used, which, within the terms of the guaranty, it should be found necessary to remedy in order that it should operate in accordance with the promise of the contract. Complaint is made that the court refused an instruction leaving it to the jury to interpret the contract in accordance with the meaning which the parties had given to it by their acts. The refusal was proper. When the contract is in writing it is for the court to state its meaning, and it is only where there is a doubt as to the proper meaning of the contract arising from the ambiguity of the words or phrases used, that the acts of

the parties are looked to for aid in construction. The rule is stated by Mr. Justice Mulkey in *The People v. Murphy*, 119 Ill. 159, with the proper limitations, as follows: "Where the terms of an agreement are in any respect doubtful or uncertain, and the parties to it have, by their conduct, placed a construction upon it which is reasonable, such construction will be adopted by the courts in the event of litigation concerning it." See also *Burgess v. Badger*, 124 Ill. 288, where Mr. Justice Scholfield states the rule in similar language. Where there is no ambiguity in the language of a written contract, and its meaning is clear to the eye of the law, the construction of the parties can not control its legal effect. *Railroad Co. v. Trimble*, 10 Wall. 367; *Ins. Co. v. Doll*, 35 Md. 89. Now, as we before said, we find no uncertainty or ambiguity in this contract, nor, indeed, do we find any evidence in this record tending to show that the parties ever gave it, by their acts, any other or different construction than that given to it by the court. Refusal of one of the parties to perform the agreement according to its legal meaning, is not a construction, nor does contention or dispute between the parties as to their duties under it, create doubt or uncertainty in the contract itself.

Appellants introduced in evidence a judgment which they had obtained before a justice of the peace against appellee for certain work done on said steam apparatus before the work was done for which he recovered in this action, and from which said justice suit it appeared that he sought to defend on the terms of the written contract. The justice refused to allow the contract in evidence, and paid no attention to the claim that it governed the rights of the parties. Of course, if the judgment before the justice related to the matter of difference between the parties arising under the contract, then whether the justice's judgment was in fact rendered on correct or incorrect principles, would make no difference. It would still be a bar to this action.

But the evidence does not show that the recovery before the justice was for repairs of the character that appellants were bound to make under this contract. It rather tends

Kadish v. Chicago Co operative Brewing Ass'n.

to support the conclusion that it was for repairs which the carelessness of appellee made necessary, and so, in substance, the jury found in answer to a specific interrogatory submitted to them at appellants' request.

In order that appellants should protect themselves by the justice's judgment, they should have proved that it involved legally the same subject-matter as this action. The jury were correctly instructed by the court on this question, and appellants have no ground of error upon it.

We have discussed the important points raised by counsel on this record. There are some objections of a minor order which do not call for discussion. They have all been considered, and are not regarded as furnishing any sufficient reason for a reversal of this judgment, and the same will therefore be affirmed.

Judgment affirmed.

LEOPOLD J. KADISH

v.

CHICAGO CO-OPERATIVE BREWING ASSOCIATION ET AL.

ADOLF KRAUS ET AL.

v.

JOHN B. RAULSTON, RECEIVER.

Insolvency—Receiver—Attorneys' Fees—Payment of, out of Funds of Estate.

1. It is well settled as a general rule in courts of equity, that where one person institutes legal proceedings for himself and others, and thereby secures a fund for the common benefit of all, an allowance will be made to him for costs and expenses necessarily incurred.

2. Upon a petition filed by attorneys who acted as solicitors for complainant in a bill in behalf of himself and other creditors and stockholders of an insolvent corporation for the appointment of a receiver, and the winding up of the same, that their fees should be paid by such receiver out of the funds in his hands, this court holds in view of the fact that it was greatly to the interest of complainant that the assets of the estate should be husbanded, the allowance of such fees would be unwarranted upon the ground that the taking of such action was a benefit to the estate.

[Opinion filed March 10, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding.

Messrs. KRAUS, MAYER & STEIN, appellants, *pro se*.

The distinction drawn by the court between services rendered and not rendered at the receiver's request, is unsound and untenable under the circumstances of this case.

As the record shows, all parties *agreed* to the appointment of Mr. Raulston as receiver, and acquiesced in his taking charge of and managing the affairs of the corporation, and collecting and distributing its assets. They reaped the benefit. Had it not been for the opportune appointment of the receiver and the issuing of the injunction on the application of complainant presented by appellants as his solicitors, the 1,800 barrels of beer in process of manufacture which the receiver afterward sold for \$6,000, would have gone to waste and become utterly worthless, and the balance of the estate would have been dissipated by the quarreling directors in the shape of preferences or lost all value under their continued mismanagement. It was the action of complainant and appellants alone that preserved this large estate to the interested parties. *Whitsett v. City, etc., Association*, 3 Tenn. Chy., decided in 1877, is exactly in point. There the bill had also been "filed by a stockholder of the defendant company, as well for all other stockholders and creditors of the company as for himself, to wind up its business," and it was held that such a person who "succeeds in securing a fund for the common benefit of all, will be entitled to an allowance for all expenses and costs incurred, including reasonable counsel fees." The court refers to a large number of English and American cases, in which substantially the same rule has been recognized and applied, notably to *Mason v. Codwise*, 6 Johns. Ch. 277, opinion by Chancellor Kent. And see *Rains v. Rainey*, 11 Humph. 261; *ex parte Plitt et al.*, 2 Wall. Jr. (W. S. C. C.) 453; 2 Dan. Ch. Pr. (5th Am. Ed.) *1213, 1214, 1411, 1422; *High on Receivers* (2d Ed.), Sec. 805.

Daniell,*1411, *supra*, says: "As a general rule, wherever an estate or fund is administered by the court, the costs of all necessary and proper parties to the proceedings are a first charge, and must be defrayed thereout, before the claims of the persons beneficially entitled thereto are satisfied. But the costs only of those proceedings which were in their origin properly directed for the benefit of the estate will be directed to be thus paid." (The word "costs," as here used, includes counsel fees: *ex parte* Plitt, *supra*, p. 478.) According to High, *supra*, "receivers are entitled in the settlement of their accounts to payments made on account of legal services and counsel fees. And such fees, when paid by the receiver in good faith, the disbursements being necessary and beneficial to the parties ultimately entitled to the fund, should be paid from such fund." In *ex parte* Plitt, *supra*, a fund under the control of a court of equity was declared to be "subject to three classes of charge: First, the necessary expenses of ascertaining it and reducing it into possession; second, a reasonable compensation for its safe-keeping and the supervision of its interests; third, the expenses of ascertaining the proper distributees and making distribution among them." Under the first head the court allowed \$1,000 to one Aspden "for his vigilant and effective service in securing a very large amount of money to the estate, and in lieu of all expenses incurred by him in and about the same."

The rule has been constantly applied in involuntary bankruptcy proceedings, upon the following grounds (Bump on Bankruptcy, 4th Ed., 220, 221): "Cases in involuntary bankruptcy are for the benefit equally of all the creditors, and it is considered unjust and inequitable to throw all the expenses upon the petitioning creditor while permitting the other creditors to share equally in the benefits and advantages of the proceedings. Such a course would not effect a due distribution of the estate. The unbroken current of decisions and the uniform practice allow him his reasonable expenses out of the fund before any distribution is made. In this way all the creditors are compelled to bear their due proportion of the burden while they share in the advantages." *In re* Williams,

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2 B. R., 83 (*28); *in re* Waite and Crocker, 2 B. R. 452 (*146); *in re* Schwab, 2 B. R. 488 (*155); *in re* Mitteldorfer, 3 B. R. 1.

Although, as pointed out in *in re* Waite and Crocker, *supra*, the bankruptcy act did not in terms sanction the payment of counsel fees out of the fund, yet the Federal courts, in analogy to the practice of the court of chancery, have always allowed it to be done. Indeed, the equity in favor of the moving creditor is so strong that it could not well have been otherwise. In the language of the court in *in re* Williams, *supra*, "such creditor is the champion of all creditors who choose to avail themselves of the benefit of the suit. Shall they do so without making the *pro rata* contribution to the expenses of the suit (as in our court of chancery) which has secured them a share in the bankrupt's estate? And shall the creditor who has (as in this case) rescued the estate and made the fund for the benefit of the general creditors, be alone excluded from the general benefit? Shall he who is thus a common benefactor be made a martyr and a scape-goat? Shall he bear the whole burden and reap scarcely any—if any—benefit? Not, certainly, if the bankrupt act is founded in justice, and its policy is to be enforced."

Messrs. HOYNE, FOLLANSBEE & O'CONNOR, for John B. Raulston, Receiver.

MORAN, J. A petition was filed in this case by Kraus, Mayer & Stein, who were solicitors for complainant, in a bill filed in behalf of himself as a creditor and stockholder of the Brewing Association, and in behalf of all others similarly interested, to have a receiver appointed for the assets of the association and to wind up its affairs, asking that the services of said petitioners rendered in preparing and filing the original bill and amending the same and procuring the appointment of a receiver and in substituting another person as receiver in place of the one first appointed, and enjoining proceedings against stockholders, should be paid by the receiver out of the fund in his hands, on the ground that the services so rendered inured to the benefit of the estate.

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The itemized bill for the services attached to the petition is as follows:

“CHICAGO, May 10, 1889.

Estate of Chicago Brewing Association,

To KRAUS, MAYER & STEIN, Dr.,

Attorneys and Counselors at Law,

Room 7-12, Nos. 77 and 79 Clark Street.

To services in preparing and filing bill of complaint and obtaining order for appointment of receiver thereon, etc.....	\$350 00
To services in and about substituting present receiver for the one first appointed, and drawing order in that regard.....	50 00
To services in matter of enjoining proceedings against stockholders.....	50 00
To services in preparing and filing two amendments to bill of complaint.....	25 00

\$175 00”

The matter was referred to the master to take proof, and he recommended the allowance of the bill and the payment thereof by the receiver, but on the hearing the court was of opinion that the receiver should pay only for the last two items in said bill, in all \$75, and denied the prayer of the petition as to the other items of said bill, and ordered said petition dismissed except as to said sum of \$75. To review this order the appeal is prosecuted, and it is strenuously urged that said Kadish, complainant in the bill, took an opportune step in filing the bill and having the receiver appointed, and by such action preserved to the estate and the interested parties a considerable amount of assets which might otherwise have been dissipated and lost, and that he therefore has an equity to have the expenses he incurred for the services of solicitors allowed from the funds of the estate. It appears from the report of the receiver that he has realized on the assets some \$47,000 from real estate as well as from personal property, but it does not appear in this record how much from each. It is claimed that some 1,800 barrels of beer were

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prevented from becoming wasted by having the receiver appointed at the time it was done.

It is, no doubt, as counsel contends, well settled as a general doctrine in courts of equity, that where one person institutes legal proceedings for himself and others, and thereby secures a fund for the common benefit of all, an allowance will be made to him for costs and expenses necessarily incurred. 2 Daniell's Ch. Pr. 1411; Whitsett v. City B. & Assoc., 3 Tenn. Ch. 526.

The principle has been frequently enforced in behalf of complainants in creditors' bills, where the proceedings are for the common interest, and proceed upon an implication of agency on the part of the party proceeding for the benefit of others, when they come in and avail themselves of the benefit of his acts. In such cases there are plain principles of equity underlying the allowing of such expenses; but on examination of this record, we are of opinion that such equity does not exist in favor of this complainant.

It is true that the bill shows that he is a creditor, and that there are other creditors; and so far he would appear to have a common interest only with others in saving and applying the property of the corporation. But the record further shows that the capital stock of the corporation consists of 1,000 shares of \$100 each, that only 275 of the shares issued have been paid for, and that only \$26,060 was paid in on capital stock. It further shows that complainant holds 599 shares of the capital stock of the company which was issued to him as collateral security for the debt due him from the corporation. On these shares of stock complainant is liable to the general creditors of the corporation. *Wheelock v. Kost et al.*, 77 Ill. 296; *Pullman v. Upton*, 96 U. S. 328.

While, therefore, he had an interest to the extent of about \$17,000 in common with creditors, he had an interest to the extent of nearly \$60,000 which was individual to himself, and was pressing upon him to see that the debts of the corporation were paid out of the property in its hands.

It does not appear from this record that any of the creditors have been paid in full, nor what per cent has been paid on

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the debts. We infer that the unpaid stock has not been called on for contribution, and as we have said, if called on it would be liable to make up a deficiency for the payment of debts in the general assets, and in such an event complainant Kadish would, as the record stands, be the chief and practically the only person liable. Under such circumstances we do not perceive what equity he has to require his solicitors' fees to be paid out of the funds raised from the general assets for the benefit of creditors. He was above all persons interested in husbanding those assets, for to the extent that he succeeded in doing so he was diminishing his personal liability to such creditors. It would appear to be in consonance with strict justice to leave him to pay his own solicitors for steps taken by them which were so manifestly for his own protection.

We are therefore of opinion that the order of the court below refusing to pay said solicitors out of the funds in the hands of the receiver was correct, and it will be affirmed.

Order affirmed.

LOREN J. LIVELY
v.
ARTHUR E. SEXTON.

Malicious Prosecution—Probable Cause—Jury—Coercion of by Trial Judge.

In an action for malicious prosecution, this court holds that on account of an objectionable remark to the jury on the part of the trial judge the verdict for the plaintiff can not stand.

[Opinion filed March 10, 1890.]

APPEAL from the Superior Court of Cook County; the
HON. JOHN P. ALTGELD, Judge, presiding.

Mr. ALLAN C. STORY, for appellant.

The line between the duties of a court and jury is perfectly well defined; and the rigid observance of it is of the last importance to the administration of systematic justice. In this way court and jury are made responsible, each in its department, for the part taken by each, and in this way alone can errors of fact and errors of law be traced to their proper sources. *State v. Smith*, 6 R. I. 34.

In *St. Louis R. R. v. Manly*, 58 Ill. 300, it was held that an intimation of a judge to a jury of his opinion on matters of fact is ground for a new trial. See also many cases to same effect cited note 9, Sec. 323, Proffatt on Jury Trials.

The declaration by a trial judge in hearing of the jury, "I shall hold that the plaintiffs are justifiable in bringing this action," was held to be ground for a new trial. *Johnson v. Johnson*, 71 N. C. 402.

If the expression of opinion by the judge is made in such a manner as that the jury may naturally regard it as a direction to them, and the evidence is conflicting, this is a fatal error. Proffatt, Sec. 324; *Ketchum v. Ebert*, 33 Wis. 611.

After a jury has retired it is error to allow them to come into court and instruct them in the absence of the parties, or their counsel. *Redman v. Gulnac*, 5 Cal. 148; *Hilliard on New Trials*, p. 374, Sec. 157; *Campbell v. Beckett*, 80 Ohio (N. S.) 210.

In all cases in Illinois the instructions and all remarks of the court must be in writing. Proffatt, Sec. 349; *Practice Act*, Sec. 52; see also *State v. Cooper*, 45 Mo. 64.

So in *McEwen v. Morey*, 60 Ill. 32, oral instructions or remarks of the judge in connection with the written instructions were held error.

In *Dula v. Young*, 70 N. C. 450, the trial judge remarked: "The plaintiffs are not entitled to recover in any event, and if the issues are found in their favor I will set aside the verdict." This was held to be error, though the court submitted the issues to be passed on to the jury to say how the matter was.

The Supreme Court says: "This manner of submitting the issues was calculated to throw the jury off their guard, and prejudice the rights of the plaintiff."

MESSRS. EDWARD MAHER and MERRITT STARR, for appellee.

GARNETT, J. This was a suit for malicious prosecution, resulting in a verdict for \$1,000 in favor of appellee. A *remittitur* of \$300 having been entered, judgment for \$700 was rendered against appellant, from which he appeals.

Upon the evidence given at the trial and correct instruction by the court, a verdict for either party could not, ordinarily, be disturbed. The integrity of the verdict, however, is based upon the supposition that it is the free and voluntary conclusion of twelve men sworn to try the issues. If we could feel satisfied that such a conclusion was reached in this case the prayer of appellant would be refused. But it appears from the bill of exceptions that after the jury had received the charge of the court, and retired to consider the case, they came back into court for further instructions, and this colloquy then occurred:

The Court: "Gentlemen, are you agreed?"

A Juror: "No, your honor, we have not, and I don't think we can. We stand eleven to one, and that one refuses to say anything; he won't talk with us or do anything; he just sits there."

The Court: "Gentlemen, you will retire and further consider this case, and I will say if there is a mistrial in this case I shall inquire into it, and if I find that any juror has stubbornly refused to do his duty or wilfully tried to bring about a disagreement so as to interfere with the administration of justice, I will send him to jail for contempt of court."

Whatever rigid analysis we may make out of this remark of the court, we think it meant to the one juror that the judge regarded him as an obstructionist, stubbornly refusing to do his duty, and that if he did not surrender his opinion by agreeing with the eleven, his liberty was in danger. The verdict may be reasonably accounted for in that way.

If the weight of the evidence on the question of probable cause was in the plaintiff's favor, the preponderance was not so plain that the most intelligent man on the jury might not have fairly and honestly maintained the innocence of the

defendant. The record does not present a case where a palpable invasion of the province of the jury may be excused for the reason that it is manifest no injury ensued therefrom. If, instead of the objectionable remark, the court had read to the jury an instruction assuming there was no probable cause the error would be admitted to be fatal. *St. L., A. & T. H. R. R. Co. v. Manly*, 58 Ill. 300. To our apprehension the remark was far more objectionable, and by many degrees more certain to bring the one juror to concurrence with the eleven.

The authority of the judge does not extend to the coercion of a single juror. By the well defined limit of his powers he is denied all discretion in that respect. It is apparent that if he may, by threats, influence one juror, the largest minority may be treated likewise. If this practice is tolerated, the uniformity of trial by jury disappears, as judges would have different views as to the size of the minority whose opinion should be respected. A reform of the jury system in this respect, if it comes at all, must be from a different source. The law recognizes only the unanimous verdict, and no other can be, directly or indirectly, introduced by the judiciary.

The judgment is reversed and the cause remanded.

Reversed and remanded.

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MARDER, LUSE & COMPANY

V.

WILLIAM C. LEARY.

Negligence—Unguarded Elevator Shaft—Personal Injuries—Evidence—Subsequent Improvement.

1. Where evidence is admissible for some, but not all purposes, the same should not be excluded from the jury. If it is apprehended that they would be misled thereby, the danger should be obviated by proper instructions.
2. It is the rule in this State that evidence of the subsequent improvements of that portion of given premises which caused a personal injury, is admissible in actions brought for the recovery of damages therefor.

Marder, Luse & Co. v. Leary.

3. In the case presented, an unprotected elevator shaft being the cause of the injury, the plaintiff having been rightfully upon the premises in question, this court declines to interfere with the judgment for the plaintiff.

[Opinion filed March 10, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Messrs. FLOWER, SMITH & MUSGRAVE, for appellant.

That in a proper case a cause should be reversed because of the improper remarks of counsel unduly prejudicial to the defeated party, has been held in the following cases, among others: Henry v. R. R. Co., 121 Ill. 264; Earl v. The People, 99 Ill. 123; Brown v. Swineford, 44 Wis. 290.

The court permitted the plaintiff to prove, over the objection and exception of appellant, that immediately after the accident the appellant erected further and additional protection to the elevator well in question, placing a crossbar in the partition of the elevator well in addition to the door which had, at the time of the accident, been the only protection. That is to say, the court allowed the plaintiff to show as evidence of prior negligence, the fact that subsequent to the accident the defendant had erected additional safeguards and barriers. This evidence was most efficiently used by counsel, as shown in part by the extracts from his speech included in the abstract, and is, as we believe, clearly erroneous. Shearman & Redfield on Negligence, Vol. 2, Sec. 382; Hudson v. C. & N. W. Ry., 59 Iowa, 584-5; Morse v. Minn. & St. L. Ry., 30 Minn. 468; Timpson v. Manhattan Ry., 1 N. Y. Supplement, 673; Village of Warren v. Wright, 103 Ill. 298.

Messrs. W. P. BLACK and A. B. CHILCOAT, for appellee.

GARNETT, J. The judgment appealed from is for personal injuries suffered by appellee from a fall through an elevator shaft in a building controlled and occupied by appellant.

The admission of incompetent evidence for the plaintiff is the first error assigned. The door through which appellee

walked into the shaft, was open at the time of the injury, and there was no bar, or other protection, across the opening. Appellee was allowed, over appellant's objection, to prove that the next day a bar was erected there as a guard. The competency of this evidence is certainly a question upon which the courts are not in accord. The latest decision in Minnesota denies its admissibility. *Morse v. Minneapolis & St. L. Ry. Co.*, 30 Minn. 465. The same view is held in New York and Iowa. *Dougan v. Transportation Co.*, 56 N. Y.; *Baird v. Daly*, 68 N. Y. 547; *Timpson v. Manhattan Ry. Co.*, 1 N. Y. Supplement, 673; *Hudson v. C. & N.W. R. R. Co.*, 59 Iowa, 581. The contrary is the rule in Pennsylvania. *West Chester & Philadelphia R. R. Co. v. McElwee*, 67 Pa. St. 311; *McKee v. Bidwell*, 74 Pa. St. 218. Similar evidence was admitted in *C. B. & Q. R. R. Co. v. Gregory*, 58 Ill. 272, and although the question does not appear to have been raised, the court comments on the evidence as strengthening the theory that the instrument which caused the injury then in question, was in a dangerous situation when the plaintiff was hurt. *The Village of Warren v. Wright*, 103 Ill. 298, denies the competency of the evidence, but since the decision in *City of Chicago v. Dalle*, 115 Ill. 386, it must be conceded that the law for this court requires its admission. The latter case, to be sure, only admits the evidence for the purpose of establishing the condition of the *locus in quo* at the time of the fall. "It is the well settled practice that where evidence is admissible for some but not other purposes, the court should not exclude it from the consideration of the jury. If it is apprehended that such evidence might mislead the jury, the danger should be obviated by proper instructions." *Farwell v. Warren*, 51 Ill. 467; *C. R. I. & P. Ry. Co. v. Clark*, 108 Ill. 114; *Webster v. Enfield*, 5 Gilm. 298.

Appellant's objection to the evidence was general, and no attempt was made to have the proof confined to its legitimate effect, by instruction from the court. So it would seem that the first assignment of error can not be sustained.

The verdict is vigorously assailed by counsel for appellant on the ground that it is against the overwhelming weight of

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evidence. We have with much care and labor examined the record for a verification of this assertion, and at the end, find it belongs to the class where the finding of the jury on the facts is conclusive. It is not denied that the door of the elevator through which Leary fell was generally kept wide open, and the entrance left wholly unguarded. Leary was lawfully upon the premises, engaged in some gas-fitting work which his employer had been engaged to do by appellant. The evidence certainly tended to prove that Leary was not familiar with the premises about the elevator door where he fell, or with the fact that the door was open at the time, or with the habit of appellant in keeping it standing open and unprotected. And there was ample evidence to warrant the jury in finding that the door to the shaft was in a dark and dangerous situation and a menace to the life of any person unacquainted with the surroundings, whose business carried him to its vicinity. The evidence was very conflicting on these points and presented a case which the jury had the right to determine according to their best judgment.

The remarks of appellee's counsel to the jury in his closing address to the jury were a trifle beyond the allowable limit, but were not of such a serious character as to call for a reversal of the judgment.

No complaint is made of the giving or refusing of instructions.

There is no error and the judgment is affirmed.

Judgment affirmed.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY
COMPANY
v.
ANNIE WARD.

Railroads—Negligence—Personal Injuries—Crossings—Practice—Trespassers—Pleading—Evidence—Variance.

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41	251
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59	23
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1. A motion in general terms on the part of the defendant that the jury be instructed to find a verdict for the defendant, upon the ground that the proof varies from the declaration, will not save the benefit of the objection.

2. The public has the right to suppose from the long and uniform practice of taking on and letting off passengers at a place other than a regular station, that its accommodation was the design, and that the railroad company had issued a general standing invitation to use the spot in question and so much ground adjoining as is necessary and convenient for the purposes of a station.

3. In such case a person may properly wait for a train at any point adjoining the usual stopping place, where it might reasonably be anticipated that any part of the train adapted to the accommodation of passengers would come to a stand.

4. Railroad companies are not liable to trespassers for anything short of wanton or wilful negligence.

5. In an action brought to recover from a railroad company, damages for personal injuries alleged to have been caused by its negligence, this court holds, that a certain rule as to movement of trains of defendant was properly received in evidence, and declines to interfere with the verdict for the plaintiff.

[Opinion filed March 10, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

Mr. PLINY B. SMITH, for appellant.

There is no station at Root street and plaintiff was a trespasser. Trains stop only on account of the crossing. The fact of people getting on and off north bound trains at this point for their own convenience, does not make it a station. A station is a place where trains stop for the purpose of receiving and discharging passengers or freight or both, and involves certain duties, such as to provide conveniences for passengers, etc.

The fact that there are no conveniences for passengers at this point, that no tickets are sold to or from it, that it does not appear upon the time card, is not advertised or held out as a station, and that no trains stop there coming south, show that it is not regarded as a station, and that the stoppage of north bound trains is not for the accommodation of passengers. C. & A. R. R. Co. v. Flagg, 43 Ill. 364; State v. N. H.

& N. Co., 37 Conn. 153; State v. N. H. & N. Co., 41 Conn. 134; Baldwin v. G. T. Ry. Co., 15 At. Rep. (N. H.) 411.

In Flagg's case, a passenger was ejected from the caboose of a freight train at a water tank a quarter of a mile from a station called Lawndale, and brought suit for being expelled from the train at a point, not the "usual stopping place," under the statute. The court say, in its opinion (p. 367):

"It is in proof that passengers desiring to enter or leave the train at Lawndale station, often did so at this water tank, as the freight train frequently passed the station itself without stopping, and the tank was only a quarter of a mile distant. It is also in proof that passengers left at the station when the train stopped there. Whether this tank was the usual place for the discharge of passengers from freight trains, was distinctly left to the jury by the sixth instruction for the defendant, and they found it was not. Their finding was undoubtedly right. A local usage adopted by persons living in the neighborhood and familiar with the ground, for their own convenience, can not be considered as making any place but a regular station the proper point for the discharge of passengers."

The plaintiff was also guilty of negligence in taking the more dangerous of two courses open to her. The place in which she stood between the tracks was nine feet four and three-fourths inches in width, while on the east side of the Rock Island passenger train, the space between the two main tracks in which she might have stood, was thirteen feet three and three-eighths inches in width, giving her a margin of four feet more of safety; a position much safer than the one she occupied.

Again, even in the space where she stood there was sufficient room for her to stand between the two trains in safety. If she had stood in the middle of the space, she would have received no injury. If a person goes into a network of tracks, where trains may be expected upon any of them, if there is space between the tracks which affords safety, the slightest care requires that that space should be occupied. It appears from the testimony presented on behalf of the plaintiff

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iff, that as others stood between the same passing trains in entire safety, she might have done the same.

She chose, however, the dangerous course in two particulars when the safe course was open, and the settled law is, that this prevents a recovery from an injury thus received. *City of Centralia v. Krouse*, 64 Ill. 19; *Lovenguth v. City of Bloomington*, 71 Ill. 238; *I. C. R. R. Co. v. Godfrey*, 71 Ill. 500; *I. C. R. R. Co. v. Hetherington*, 83 Ill. 510; *L. S. & M. S. Ry. Co. v. Hart*, 87 Ill. 534; *K. P. Co. v. Henry*, 50 Ill. 269; *I. C. R. R. Co. v. Hall*, 72 Ill. 222; *C. & N. W. Ry. Co. v. Donahue*, 75 Ill. 106; *Foster v. C. & A. R. R. Co.*, 84 Ill. 164; *Austin v. C., R. I. & P. Ry. Co.*, 91 Ill. 35; *C. & N. W. Ry. Co. v. Bliss*, 6 Ill. App. 411; *Abend v. T., H. & I. R. R. Co.*, 111 Ill. 202.

Again, the place where she went being one of positive danger, commensurate prudence required positive or affirmative acts of care to avoid existing positive dangers. *C. & O. R. R. Co. v. Olson*, 12 Ill. App. 251.

Mr. E. F. MASTERSON, for appellee.

GARNETT, J. The judgment of which this appeal complains, was for personal injury to appellee, on April 29, 1886, at appellant's railway crossing of Root (or 42d) street, in this county. At that time there were crossing at that point what were known as the new-main, the in-main and the out-main tracks, the new-main lying on the east, the in-main, nine feet four and three-fourths inches further west, and the out-main, thirteen feet two and one-half inches still further west. There were two other tracks at the same crossing, both lying west of the out-main, and east of the new-main were three switch tracks, the one lying farthest east, running into appellant's round-house, which was built just south of Root street: The in and out-main tracks were used jointly by appellant and the Chicago, Rock Island & Pacific Railway Company.

In the morning of the day named, appellee was at the Root street crossing, waiting to take passage on the 7:30 A. M. Rock Island suburban passenger train, bound north for the

city of Chicago. As the train was seen approaching on the in-main track, she, with other persons who were there with the same purpose, moved south of the south line of Root street, to board the train where they could get seats, having found by experience that the seats in the front cars of the train were always filled before reaching that place. Appellee and several other persons stood between the new and in-main tracks waiting for the train, while others stood between the in and out-main. Seeing the train coming rapidly from the south, and fearing her clothing might be caught in the draft caused by the rapid motion, she drew back toward the east, and was struck and injured by the tank of appellant's engine which was slowly backing south on the new-main track.

The circumstances of the case, as developed by the evidence, are such that this court has no right to interfere with the verdict, unless some error of law intervened.

The first point made by the appellant is, that the proof varies from the declaration. Without commenting upon the fact of a variance, it suffices to say that no specific objection on this ground was made in the trial court. When the evidence was nearly all in, counsel for appellant did move the court to instruct the jury to find a verdict for the defendant on the ground that "the proof varies from the declaration." The benefit of the objection is not saved by a motion so general in its terms. *St. Clair Co. Ben. Soc. v. Fietsam*, 97 Ill. 474; *Start v. Moran*, 27 Ill. App. 119.

Appellant's second point is, that there was no station at Root street and appellee was a trespasser, as she was thirty-five feet south of Root street when she was struck. No station house, ticket office or platform was built there. Some of the north bound trains stop at the 39th street station, being the next station north of Root street, but the 7:30 A. M. Rock Island passenger train did not stop at 39th street. Appellant did not advertise Root street as a station, or name it as such on its time cards, and no tickets were sold to or from there. Tickets were sold to and from 39th street, and were received in payment of fare from passengers taking trains at Root street. But it is a conceded fact, that for twenty years prior

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to April 29, 1886, the north bound trains of both roads had all stopped at Root street, and during all that time all the suburban passenger trains were in the habit of receiving and discharging passengers there. No objection was ever made to the practice by either road, and no warning given to the public generally or to those in the habit of taking the train at Root street, that there was no station at that place. Appellant says that the trains were stopped there on account of the stock yards railroad crossing at 40th street, and not for the accommodation of passengers. The distance of that crossing from Root street is variously stated by the witnesses. One testified that it was about 300 feet, another about 600 feet, and another about 1,000 feet. Taking either estimate as approximately correct, a stop at Root street was certainly unnecessary in obedience to the statute. If the distance was 300 feet, the trains could have stopped south of there, or if it was 600 feet or more, they could have stopped further north. Some other object must have been contemplated, and the public had the right to suppose from the long and uniform course of business, that their accommodation was the design, and if so, they might well assume that the railway companies had issued a general and standing invitation to use the ground at Root street, and so much adjoining thereto as was necessary and convenient, for the purposes of a station. *Thompson on Carriers of Passengers*, 268.

Failing to indicate by platform, or otherwise, the bounds within which it would be safe for passengers to stand while waiting the arrival of a train, momentarily expected, appellant can not complain if a person intending to take passage stations himself at any point adjoining the usual stopping place, where it might reasonably be anticipated that any part of the train adapted to the accommodation of passengers would come to a stand. *Chicago & Alton R. R. Co. v. Flagg*, 43 Ill. 364, is cited by appellant to support its contention that there was no station at Root street. We need not find fault with that case.

What was, within the words of the statute as it then read, a "usual stopping place" for ejecting passengers who

refused to pay fare, is not the same question as that now presented to the court. Should the company be permitted to deny the effect of its invitation to the public when it becomes its interest to do so? It is true that the stopping at Root street was for the convenience of the public. So should be every stopping place on a railroad. But it is equally true that the stopping at Root street was for the advantage of appellant. For it to now say that the *only* object was the convenience of the public sounds strangely. The stop there and transportation of passengers to the city for the same fare as if they got on at 39th street, was more than appellant was legally bound to do. But the extension of this slight favor can not be used as an excuse for neglect to provide reasonable precautions for the safety of the passenger at the place where he is invited to enter the train.

We believe the true rules applicable to the facts of this case are stated in Thompson on Carriers of Passengers, page 269: "Wherever a railroad company is in the habit of receiving passengers, whether at a station or some point outside, or if by the regular operation of trains it is necessary to traverse portions of the premises outside of the station house, passengers have a right to assume that such parts of the premises are in a safe condition for such purpose, even on a dark night. * * * Injuries frequently happen to passengers by being run over by other trains passing through stations, while taking or leaving their own trains. In cases of this kind, it would seem that if the running arrangements of the road are such that it is necessary to pass over a railroad track in order to take or leave a train, the passenger may rightfully expect protection against the running of trains at such a time, and may, therefore, properly relax that vigilance for his safety which is ordinarily demanded of one coming upon a railroad track."

The court admitted in evidence, over appellant's objection, this joint rule of the two railroad companies:

"9. When passenger trains are at stations or street crossings, receiving or discharging passengers, other trains or engines must not, under any circumstances, pass between the

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standing train and station, or until the track is known to be clear.

"Engineers and train men will look out for local and dummy trains of both roads, that stop at street crossings, between Englewood and Chicago.

"For the government and information of employes only."

It is said that the rule should not have been admitted, as it was not set up in the declaration. A similar point was decided adversely to appellant in *Coates v. The Burlington, C. R. & N. Ry. Co.*, 62 Iowa, 486; see, also, *Chicago City Ry. Co. v. Wilcox*, 33 Ill. App. 450. The evidence is competent as an admission of the defendant.

Plaintiff's third instruction was predicated upon the hypothesis that she was a trespasser and by it the jury were instructed that the defendant was liable if its servants could, by reasonable care, have avoided injury to plaintiff. Railroads are not liable to trespassers for anything short of wanton or wilful negligence, but as there was no evidence tending to prove plaintiff a trespasser, the error in the instruction was harmless.

The main points of the contention have now been disposed of, and without commenting separately upon each of the remaining objections to the judgment, presented by the appellant's brief, we will simply say that due attention has been given to them all, and we are satisfied there has been no error warranting a reversal.

The judgment is affirmed.

Judgment affirmed.

35	430
50	044
50	080
35	430
57	206

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY
COMPANY

v.

SWAN A. JOHNSON.

*Railroads—Negligence—Personal Injuries—Crossings—"Kicking"
Cars—Comparative Negligence—Evidence—Instructions.*

Lake Shore & Michigan Southern Ry. Co. v. Johnson.

1. It is wanton and reckless negligence on the part of a railroad company to send cars, under no control, across public streets.

2. In an action brought to recover damages from a railroad company for personal injuries alleged to have been occasioned by its negligence, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff.

[Opinion filed March 10, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Mr. PLINY B. SMITH, for appellant.

MESSRS. MILLER, LEMAN & CHASE, for appellee.

GARY, P. J. On the evidence the verdict of the jury for the appellee ought not to be disturbed.

Twenty-fifth street in the city of Chicago is an east and west street and the north sidewalk thereon is crossed by eight railway tracks. The most eastern of them going north trends to the east, and enters a coal yard, through gates, and a fence coming south along the west side of the coal yard to the north line of the sidewalk, separates that track from the one next west. The latter, called in the plat in evidence No. 3, is the one on which the appellee was hurt. It also, in crossing the sidewalk, runs parallel to the first, so that in going south, it trends to the west, and about six feet south of the south sidewalk of the street, enters by a switch the next track to the west, No. 2, which runs due north and south. Considerable distance south of the street, No. 2 connects by a switch with another due north and south track, No. 1.

Before the appellee arrived upon the ground, the appellants had brought a lot of cars south from Twenty-fourth street on track No. 3, run south to Twenty-sixth street, and on the track No. 1, and then "kicked" (that is, giving the cars a start by pushing, and then letting them loose) some of them north on track No. 1 and kicked others north on track No. 3.

The grade there was slightly a down grade to the north, so

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that with a little start the cars would run. Necessarily, after kicking cars down No. 1, the switch connecting No. 2 with No. 1 must have been shifted before cars could be sent on No. 3. The appellee testified to coming to the tracks from the east, looking south and seeing nothing to excite apprehension of danger, and stepping upon No. 3 and waiting there for trains to pass and leave the tracks west of him clear, before he went on his way. The experience of some, and the observation of many, teach that there is danger in crossing, and more in standing upon railway tracks. Under the law of comparative negligence, however, of the wisdom of adopting which this case furnishes an illustration, an injured plaintiff is not always barred of his remedy because of his own want of care. If, with impunity, railways may, without warning or precaution, send cars under no control, across public streets of a great city, it may reasonably be expected that they will not discontinue the practice. It can be predicted almost with the certainty of an astronomical calculation, that such a course of conduct will result in mayhem and death of citizens. It is, therefore, wanton and reckless negligence to pursue it. Railways have no right to create perils so "that the slightest indiscretion on the part of the employe will prove fatal." *C., B. & Q. v. Gregory*, 58 Ill. 272. Much less so that persons unconnected with their service are unnecessarily exposed to danger.

In passing upon the question of the negligence of the appellee, the jury had before them a plat which showed that the track No. 3, on which he stood, stopped six feet south of the south side-walk of the street. A very slight knowledge of railway construction would tell him that it there connected with track No. 2, but it was yet a circumstance which they might consider in connection with his testimony as to looking south and seeing no danger.

The jury were instructed in such manner that the conduct of both parties, as shown by the evidence, was fairly presented for their consideration as to the negligence of each, and the degrees of negligence respectively. The first count, alleging that the defendants "so improperly and carelessly drove,

pushed and managed the said locomotive engine and train of cars, that by and through the negligence and improper conduct of the defendant, by its said servants, the said train of cars ran and struck with great force and violence upon and against the said plaintiff," is sufficient to admit evidence of all the circumstances under which the cars were pushed or "kicked" across the street. See forms, 2 Ch. Pl., 708; C., B. & Q. v. Carter, 20 Ill. 390; 8 Went. Pl., 400; Mitchell v. Tarbutt, 5 D. & E. 649.

A practice has grown up here of pleading with unnecessary particularity the manner of the negligence in actions of this kind, by which the admissibility of evidence is narrowed, and the field for variance widened. The appellants asked that the jury be instructed, peremptorily, that the appellee could not recover under the 2d, 3d and 4th counts, and by another instruction that he could not recover under them unless certain facts were proved. The court could not be expected to give inconsistent instructions, and gave the latter.

One of the counts was based upon the alleged absence of any flagman, as required by a city ordinance. There was no proof that the place was within the district in which the ordinance required a flagman.

And it is now objected that submitting to the jury whether the appellants were guilty, as charged in the declaration, was submitting a hypothesis of which there was no evidence.

The same question was presented in H. & St. J. R. R. v. Martin, 111 Ill. 219, and the second answer to it, there given, is an answer here.

It must be admitted that some of the instructions for the appellee are subject to criticism on the score of assuming the existence of facts in dispute, if tried by the strict rules laid down in some of the reported cases. Those cases impute to the jury a degree of philological astuteness with which they are not to be credited in a case in which the court is entirely satisfied with the verdict.

All questions made upon the special questions to the jury, are answered by the case of C. & N. W. Ry. v. Dunleavy,

129 Ill. 132. On the whole record the result is right. Nothing of which the appellants complain affected the decision of the main question in the case, and the judgment must be affirmed.

Judgment affirmed.

35 434
130s 251

CHICAGO CITY RAILWAY COMPANY

v.

GEORGE H. HASTINGS.

Street Railroads—Negligence—Starting with Sudden Jerk—Evidence—Instructions—Damages—Loss of Time.

1. In an action brought for the recovery of damages for personal injuries, alleged to have been occasioned through the negligence of another, it is proper to instruct the jury to consider, in the estimation of damages, plaintiff's loss of time, there being neither allegations nor direct proof thereof, where the injury suffered necessarily imports such loss.

2. In the case presented, this court declines to interfere with the judgment for the plaintiff, for an injury alleged to have been occasioned by the sudden starting of a train of street cars.

[Opinion filed March 10, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. C. M. HARDY, for appellant.

Messrs. ERNEST DALE OWEN and SETH F. CREWS, for appellee.

GARY, P. J. The appellee alleged in this declaration injury sustained by him through the negligence of the appellants, stating the manner—that his left thigh was broken, and as a consequence, that he has been sick and languishing from thence hitherto, and has become permanently crippled; and on the trial put in testimony to prove the truth of this declaration.

The brief of the appellants urges that the court erred in instructing the jury that in estimating the damages they might consider his loss of time so far as shown by the evidence, there being neither allegations nor direct proof of loss of time. From a broken thigh, which was alleged and proved, the loss of time is such an inevitable result, that the instruction is right. *Chicago v. Sheehan*, 113 Ill. 658. The brief also urges that no instruction on comparative negligence ought to have been given; that one or the other of the parties was wholly to blame, and that the effect of such an instruction was to confuse the jury and that it left them "at liberty to straddle" and find that each was partly blamable. Under the circumstances as the appellee in his testimony stated them, it might be argued that he was not as careful as he ought to have been. He says that as the grip reached the crossing, he raised his hand as a signal, and then walked in the direction the cars were going about the length of a car and the grip, and as the grip came to him and stopped, he took hold of a standard, put his foot on the footboard, and as he was raising himself, the car was started with a sudden jerk which threw him down. Why did he not take the car at the crossing, the counsel might ask of the jury.

The accident happened about 8:30 p. m. May 20, 1887, near, but north of Twenty-fourth street, on State street. There were four witnesses as to the occurrences at the time. The first point in dispute is whether the cars stopped at all before the appellee fell. He says they did, and the grip driver and a passenger say they did not. The appellee is, in this part of his case, corroborated by his sister-in-law. They both say that they walked together from Michigan avenue to State street on Twenty-fourth street and when near the track of the railway he signaled for the cars to stop, which they did. He then left her, they say, going northward, and she says she knew nothing more of him that night. Her home was on the northwest corner of the same streets, and she says that after he left her, she waited on the crossing until the cars came to a standstill, and when they started she went round the rear to her home; that after she had crossed she

noticed the cars stopped again, and she then saw a man that was hurt being removed.

It is fair inference from her testimony, though she does not say it, that she supposed that the appellee had safely boarded the car, or at any rate no thought to the contrary crossed her mind, so that she did not connect the hurt man with her brother-in-law. Now, if on this conflict of evidence between the appellee and his sister-in-law on the one side, and the driver of the grip and the passenger on the other, the jury believe that this car stopped at the crossing, they would naturally and reasonably adopt his version of the manner in which he was thrown down, instead of the contrary one, that he ran after, and attempted to jump upon the grip, which had not slackened speed at all.

The jury were instructed peremptorily that if he attempted to board the car while it was in motion, he could not recover whether he had signaled it to stop or not.

A paper purporting to be an affidavit by the appellee, was put in evidence by the appellants, with an admission by the counsel for the appellee that an absent witness, if present, would swear to such circumstances as would show that it was fairly obtained by the appellants. The appellee gave his version of how it was obtained, and the jury disregarded it. The court, in an instruction to the jury, told them that the affidavit was introduced for the purpose of impeaching the appellee. This statement might well have been omitted, yet it could have done no harm. Had it been an affidavit of a witness for the appellee, it would have been, after a proper foundation laid, admissible strictly as impeachment; but being the affidavit of the appellee himself, it was admissible as original evidence against him by his own admission, that the accident happened, not as he testified on the trial, but as the appellants endeavored to convince the jury that it did. But that instruction also told the jury that if from the evidence they believed that the accident occurred in the manner set out in the affidavit, the appellee could not recover, and that was the real question for the jury to pass upon. On the whole case there is no error, and the judgment is affirmed.

Judgment affirmed.

Kahn v. Kohn.

JACOB KAHN ET AL.

V.

JOSEPH A. KOHN ET AL.

Trespass—Attachment—Goods in Possession of Mortgagees—Assignment—Preferences—Law of Nebraska.

In an action of trespass brought against the defendants for attaching goods in the hands of mortgagees, the mortgagor being indebted to them, the contention on the part of defendants being, that the mortgages were void under the statute of the State of Nebraska concerning assignments, the goods in question being located therein, this court holds that the evidence does not justify the view that the mortgages in question were intended as preferences, but does warrant the assumption that they were given to pay *bona fide* debts, and declines to interfere with the judgment for the plaintiff.

[Opinion filed March 10, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

Messrs. FLOWER, SMITH & MUSGRAVE, for appellants.

Messrs. TENNEY, HAWLEY & COFFEEN, and A. W. GREEN, for appellees.

GARY, P. J. This case has been argued here, both orally and on briefs, upon the merits as they would appear under the law of Nebraska.

One A. M. Hayden, of Wymore, Nebraska, having a store there, and another about thirty miles distant in Washington, Kansas, owed the appellee firm of Kohn Bros., \$2,400, and the appellee firm of Bradley & Metcalf, \$6,350. To other creditors he was indebted in the sums of \$6,000, \$400 and \$1,300, respectively.

Urged by an attorney of Wymore, who, perhaps, assumed a good deal more authority to act for creditors than he had in fact, Hayden consented to mortgage his stock of goods at

Wymore to the appellees, and that at Washington to secure the \$1,300 debt above mentioned, and, of his own will, made mortgages on the latter store to the creditors of the \$6,000 and \$400 debts, giving them precedence of the \$1,300 mortgage.

Hayden owed many other debts, for the payment of which no provision was made, and to pay which he had no sufficient assets. The appellants attached the stock at Wymore, being themselves creditors of Hayden, on the ground that the mortgages on the stock were void under the statute of Nebraska concerning assignments, which enacts that "no voluntary assignment for the benefit of creditors, hereafter made, shall be valid, unless the same shall be made in conformity to the terms of this act;" and "every such assignment shall be void against the creditors of the assignor, first, if it gives a preference of one debt or class of debts over another."

Reading all the evidence in the case, no fair inference can be made therefrom, that these several mortgages were not intended to have the effect, and only the effect, which, by their terms, the law gave them.

They were for *bona fide* debts; there was no agreement, express or implied, that they should be used for any other purpose than to procure payment of those debts. There was no trust, open or secret, for the benefit of Hayden. That the attorney in drafting the mortgages putting them on record, and in the subsequent sale of the property covered by them, stood in a fiduciary relation to the mortgagees is true, but that relation was independent of Hayden, and in the creation of it, Hayden had no part. And that Hayden, after the execution of the mortgages, consented that the mortgagees should sell the goods at private sale, and before their execution knew they would stop his business, and intended they should operate as preferences to the mortgagees over his other creditors—any and all of these circumstances do not bring the mortgagees within the letter of the statute to affect their validity. And the Supreme Court of that State seems to hold that mortgages to creditors to secure *bona fide* debts, by an insolvent

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debtor, which operate as preferences, are not avoided by the statutes. *Davis v. Scott*, 22 Neb. 154. But if made to a trustee for several creditors the rule is the other way. *Bonns v. Carter*, Ib. 495.

It follows that the appellants, having attached the stock at Wymore, where it was in the possession of the appellees, under their mortgages, are liable in this action of trespass for the value of the goods they took. There is no error and the judgment is affirmed.

Judgment affirmed.

WILLIAM TAUSSIG ET AL.

V.

SIMON REID ET AL.

35	439
145	488
35	439
54	644

Guaranty—Debt Incurred by Another—Default of Debtor—Notice—Demand.

In case of a collateral continuing guaranty of the payment of debts of uncertain amounts, to mature at periods unknown, and the existence of which depends entirely on the future action of the principal and the guarantee, reasonable notice of default of payment by the principal need not be given to the guarantor, and he is not discharged to the extent of his loss or damage caused by the failure to give him such notice.

[Opinion filed March 10, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. R. S. TUTHILL, Judge, presiding.

Messrs. KRAUS, MAYER & STEIN, for appellants.

Messrs. HOFHEIMBE & ZEISLER, for appellees.

Baylies in his work on Sureties and Guarantors, page 200, thus states the condition of the law on the question under consideration:

"The question as to whether notice of the default of the principal debtor is necessary to fix the liability of the guarantor, has given rise to numerous and conflicting decisions, which it would be idle to attempt to harmonize. For the rule of law in any State determining this question, the reported decisions of that State must be the guide."

And on page 202, the same author says: "In Illinois it is laid down as a general rule that where one guarantees the act of another, his liability is commensurate with that of his principal, and that he is no more entitled to notice of default than the latter. Both must take notice of the whole at their peril."

In *McGuire v. Newkirk*, 1 Engl. (Ark.) 142, cited by appellants, the guaranty was as follows:

"We hereby guarantee the payment of bill of this date to Newkirk & Olden, by Randolph & Keeshley, for \$806.12.

"MONTGOMERY, KELLY & Co."

The guarantors being sued upon this instrument, the Supreme Court of Arkansas held "that the stipulation is to pay in case the original debtor does not, and is an auxiliary obligation; * * * that the creditor ought not to be allowed to enforce the payment of the security without notice of the non-payment of the principal debtor."

In *Gage v. Mechanics Nat. Bank*, 79 Ill. 62, the guaranty was: "For value received, we guarantee the payment of the within note at maturity." Our Supreme Court came to the conclusion "the holder was under no obligation to demand payment of the maker, and on his default to notify the guarantors, for they undertook to pay, at all hazards, at maturity, the one being as much bound as the other. * * * It is a primary, positive undertaking, joint and several in its nature."

Or, as this court said with reference to exactly the same kind of a guaranty in *Johnson v. Glover*, 19 Ill. App. 585 (588, bottom): "A contract of guaranty is not a collateral but an original undertaking." In *Virden v. Ellsworth*, 15 Ind. 144, likewise cited by opposing counsel, the guaranty

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was as follows: "For value received, I guarantee the payment of the rent, as stipulated by said Ford, in case of non-payment by him."

The Supreme Court of Indiana hold that "the undertaking or contract of the guarantor was distinct from that of the principal, and collateral thereto;" therefore notice of the default of the lessee was necessary.

We invite a comparison of that case with the decision of our own Supreme Court in *Voltz v. Harris*, 40 Ill. 155. There, also, "Voltz signed a guaranty to the effect that he would be responsible for the rent and for all damages the lessors might sustain by reason of non-compliance or fulfillment of the lease by Widmer."

In this case, the Supreme Court say (page 159): "By the terms of the guaranty in this case, the liability of the guarantor was primary and for all rent, and consequently he was not entitled to notice. It was his duty to see the rent was paid by Widmer, or by the person he had let into possession." In the case of *McDougal v. Calef*, 34 N. H. 534, the guaranty was as follows:

"This may certify that we, being acquainted with Frank Stevens, and reposing good confidence in his honesty, and the goods you may see fit to entrust him with we will hold ourselves good for, provided he should sell them and abscond with the money and squander them away, and this shall be your note against us.

Signed: "DANIEL J. CALEF,
"J. FELLOWS."

The condition of guarantors' liability is very clearly expressed: "provided he should sell the goods and abscond with the money and squander them away."

The guaranty, therefore, was a conditional undertaking, not an absolute one, and upon that ground the court very properly held notice of default to be necessary; and they clearly make this distinction, that where the guarantors' undertaking is absolute no demand or notice is necessary; otherwise, where the undertaking is only collateral.

The New Hampshire doctrine will more clearly appear from

two other decisions of that State. See *March v. Putney*, 56 N. H. 34; *Bank v. Sinclair*, 60 N. H. 100.

In *Smith v. Ide*, 3 Vt. 290, the guaranty was as follows:

“MR. WILLIAM SMITH.

“SIR: Avara Gilman says he has bought a pair of horses of you for \$200 in sixty days. I will warrant him to pay according to his agreement.

“Signed: GEORGE IDE.”

The court say: “The last point made in this case depends on the question whether the undertaking of the defendant was absolute or conditional. And we think it was an absolute engagement that Gilman should pay for the horses at the expiration of sixty days, or that the defendant would himself make the payment. Therefore, on failure of payment at the time it fell due, the defendant became fixed with this debt without reference to any demand on Gilman or notice to himself.” See *Train v. Jones*, 11 Vt. 444; *Sylvester v. Downer*, 18 Vt. 32; *Noyes v. Nichols*, 28 Vt. 159; *Craft v. Isham*, 13 Conn. 28; *Bushnell v. Church*, 15 Conn. 406.

On all fours with the case at bar is *Lowe v. Beckwith*, 14 B. Mon. (Ky.) 150. The court there considers all arguments of reason as well as of authority, in favor of the proposition contended for by appellants, finds proper and convincing answers thereto, and reaches the conclusion that notice of the default of the principal debtor is unnecessary.

In *Yancey v. Brown*, 3 Sneed (Tenn.), 89, the guaranty was as follows:

“Mr. W. G. Stuart, the bearer of this, is a young man who has lived with me for the last twelve months, and has now visited your city with a view of buying a small stock of goods. Knowing him to be a young man of strict integrity, and of sober, moral and industrious habits (and I have known him all his life), I have no hesitancy in recommending him to you as such. I want you to sell him a bill of goods on the best terms you can afford; I will guarantee the payment of every dollar.

“Yours most respectfully,

“JOHN YANCEY.”

In regard to the question of notice of the failure of the principal debtor, the court say (p. 96):

"Upon much consideration we have adopted the doctrine of the English authorities upon this subject; and the settled law in this State now is, that where the instrument purports to be an absolute engagement, no notice either of the acceptance of the guaranty, or of non-payment by the principal, is necessary."

In *Clark v. Burdett*, 2 Hall (N. Y. Super. Ct.), 197, the guaranty was as follows:

"I hereby guarantee the payment of any bill or bills of merchandize Mrs. Phillips has purchased or may purchase from E. P. Clark & Co.; the said Mrs. Phillips having the privilege of ninety days' credit on the purchases made by her, the amount of this guaranty not exceeding two hundred dollars, and this guaranty to expire at the end of one year from this date.

"JACOB BURDETT."

Objection was made to the plaintiff's recovery on the ground that no demand on the principal debtor for payment had been made, and no notice of default had been given to the defendant. But the court decides that neither was necessary.

In *Smith v. Dann*, 6 Hill, 543, this was the form of the guaranty:

"If you will let Mess. Steel & Wall, of this village, grocers and bakers, have 100 dollars in goods at your store on a credit of 3 months, you may regard me as guaranteeing the payment.

"AMOS DANN."

The court say: "If the defendant wanted notice, and did not get it from the persons whom he thought worthy of credit, it was his business to inquire and ascertain what had been done.

"I know there are cases which require notice (see *Adams v. Jones*, 12 Pet. 207; *Reynolds v. Douglass*, Id. 497; *Am. Jur.*, Vol. 27, p. 336 *et seq.*), but we think they are not based upon the common law, and for that reason they have not been followed in this State." See *Douglass v. Howland*, 24 Wend.

35; *Whitney v. Groat*, 24 Wend. 82; *Allen v. Rightmere*, 20 Johns. 365; *Ketchell v. Burns*, 24 Wend. 456; *Brown v. Curtiss*, 2 N. Y. 225; *Clay v. Edgerton*, 19 O. St. 549.

In *Woolley v. Sergeant*, 8 N. J. L. 262, the rule is broadly stated that except in cases of mercantile instruments, the obligation of a guarantor or surety is absolute and unconditional without necessity of demand upon the principal debtor or notice of his failure to pay.

An examination of the decisions of our own State will establish their entire harmony with the common law view and their repudiation of the doctrine introduced into American jurisprudence by the *dicta* of Marshall and Story.

Let us first quote from *Gage v. Lewis*, 68 Ill. 604, where it is stated (p. 618), as "a general rule, that where one guarantees the act of another, his liability is commensurate with that of his principal, and he is no more entitled to notice of the default than the latter. Both must take notice of the whole, at their peril. *Somersall v. Barnaby*, Cro. Jac. 287; *Atkinson and Wolfe's case*, 1 Leon. 105; *Douglass v. Howland*, 24 Wend. 35; *Hammond v. Gilmore's Adm'r*, 14 Conn. 479; *Duffield v. Scott et al.*, 3 Term R. 374."

It is clear from the citations made in support of the above text, that our Supreme Court, with reference to the question of notice of default, stand upon common law ground and are in full accord with the New York doctrine as expressed in *Douglass v. Howland*, *supra*, as well as with the modified view of the Connecticut Supreme Court. It will be remembered that *Douglass v. Howland*, in terms rejects the opinions of Ch. J. Marshall in *Russell v. Clark*, 7 Cr., and that of Story, J., in *Douglass v. Reynolds*, 7 Pet., as having no foundation in English jurisprudence.

Our Supreme Court has, at least by implication, done the same, by citing with approval the case of *Douglass v. Howland*.

The oldest Illinois decision involving the point under discussion is *Heaton v. Hurlbert*, 3 Scam. 480. It still flavors of the rule of *Douglass v. Reynolds*, which it cites, and winds up by stating that "a distinction has been taken

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between the absolute guaranty of a promissory note, or a sum ascertained and certain, and a letter of credit, with a guaranty which requires acceptance and notice." But this is entirely *obiter dictum*. See *Allison v. Waldham*, 24 Ill. 132; *Penny v. Crane Bros. Mfg. Co.*, 80 Ill. 244; *White v. Walker*, 31 Ill. 422; *Voltz v. Harris*, 40 Ill. 155; *Dickerson v. Derrickson*, 39 Ill. 574; *Powell v. Chicago Carpet Co.*, 22 Ill. App. 409; *Hance v. Miller*, 21 Ill. 636; *Gridley v. Capen*, 72 Ill. 11; *Johnson v. Glover*, 19 Ill. App. 585; *Gage v. Bank*, 79 Ill. 62.

GARNETT, J. This is an appeal from a judgment against appellants for \$1,680.34, upon the following instrument signed by them:

"For value received I hereby guarantee the prompt payment at maturity of any indebtedness owing to Reid, Murdock & Fischer by Mrs. Mathilde Zuckerman, of 370 State street and 214 and 216 North Clark street, Chicago, for goods purchased or which may be purchased hereafter of them to the amount of \$1,500, with interest on all the above indebtedness according to the tenor and effect thereof at the rate of eight per cent per annum, and I agree to pay all costs and expenses paid or incurred in collecting the same.

"Signed at Chicago, this 14th day of January, 1887.

"E. KOHN.

"Witness: JOS. ZUCKERMAN, WM. TAUSSIG."

The judgment includes interest on the \$1,500 from the time this suit was commenced. Mrs. Zuckerman was, at the date of the guaranty, the proprietor of two retail grocery stores at the places named, and appellees were engaged in business in Chicago as wholesale grocers.

Immediately after the delivery of that paper to appellees they commenced to sell her goods on credit, and continued such sales until November 23d following. The state of her account varied at different times. In April she was indebted to appellees over \$1,800, which was settled by her promissory notes, guaranteed by appellants; the notes, however, are not the basis of this action. On June 1st she was in default to the extent of \$1,762.30; July 1st and August 1st, over \$1,900;

September 1st, \$2,112.63; October 1st, \$2,342.80; November 1st, \$2,389.51, and November 23d, \$2,714.96.

This suit was brought December 9, 1887, and, among other defenses, appellants set up that no notice was given to them of the default of Mrs. Zuckerman in paying for the goods, and that in consequence thereof, and of her insolvency, they were deprived of the opportunity to secure indemnity. There was evidence tending to prove that she became insolvent November 24, 1887, and that no notice of her default was given to appellants before that time.

It must be admitted that the authorities leave this question in considerable confusion. But I conceive the weight of authority in this country to support the doctrine that in case of a collateral continuing guaranty of payment of debts of uncertain amounts, to mature at periods not known, and the existence of which depends entirely on the future action of the principal and the guarantee, reasonable notice of default of payment by the principal must be given to the guarantor, and he is discharged to the extent of his loss or damage caused by the failure to give him such notice. It makes no difference that the guaranty limits the amount of the indebtedness. Such a case was *Howe v. Nickles*, 22 Me. 175, where the court held that two general principles may be considered as fully established in cases of this kind: first, that the guarantor must be apprised of the acceptance of the proposed guaranty; second, that he must within a reasonable time be notified of the amount which may have been advanced, and of demand of payment, without effect, of the principal debtor. So in *Douglas v. Reynolds*, 7 Peters, 113, which was a suit on a continuing guaranty of acceptance or indorsement of the principal's paper, or advances to him in cash, not to exceed \$8,000, the court held that, while the creditors were not bound to institute legal proceedings against the debtor, they were required to use reasonable diligence to make demand, and to give notice of non-payment to the guarantors. The same defense was set up in *Davis v. Wells*, 104 U. S. 159, where the court fully recognized the rule contended for by appellants, but held the terms of the contract waived demand and notice.

In *Dickerson v. Derrickson*, 39 Ill. 574, the court, after first holding that no demand or notice of non-payment is required where the guaranty is absolute, say: "When, however, the guaranty depends upon the happening of a contingent event, it is necessary, when the event has occurred, that notice should be given to the guarantor within a reasonable time. This is manifestly proper to enable the guarantor to secure himself against loss. 2 Parsons on Contracts, 174. But what is a reasonable time depends upon the circumstances of the case. If, however, it is given before loss could occur, or the situation of the parties become changed so as to endanger loss, it is believed to be sufficient. If delayed so long as to deprive the guarantor of the means of rendering himself secure, it would not be in time, and the guarantor would be released." This principle is supported by the reasoning in *Newman v. Streator Coal Co.*, 19 Ill. App. 594, where the court cites, with approval, *Howe v. Nickles*, 22 Me. 175. See, also, *Smith v. Bainbridge*, 6 Blackf. 12; *Clark v. Remington*, 11 Met. 361.

The only notice that was ever given to appellants of any action on the faith of the guaranty was when they were requested, in April, 1887, to guarantee the notes of Mrs. Zuckerman for something over \$1,800.

To require notice of default in payment imposes no unreasonable burden on the creditor. If he does not give notice, the guarantor must either rely on the principal to voluntarily keep him informed, or he must, in order to protect himself, make continual inquiries of the creditor.

Not knowing when, if at all, indebtedness will be contracted, or when it will become payable, he can not know whether it is paid or not without taking upon himself annoyance that no one would care to endure. It is apparent that if guarantors, in this class of cases, are to receive such treatment from the courts, it will operate as a great discouragement if not a practical prohibition of all friendly assistance of that kind. The first instruction given for the plaintiffs authorized a recovery without requiring demand and notice of non-payment, and without noticing the alleged damage to the defendants in con-

sequence thereof. In this the instruction was faulty, and the omission was not supplied by any other instruction. Whether there was demand and notice of default, and whether defendants suffered any damage by reason thereof, should have been submitted to the jury under a proper instruction. *Howe v. Nickles*, 22 Me. 175; *Gibbs v. Cannon*, 9 Serg. & R. 198.

The other assignments of error are not well taken.

The views expressed in this opinion as to the necessity of demand and notice of default are personal to the writer, but as the other two judges of the court lean to the other side of the question, and desire the question finally set at rest by the Supreme Court of the State, the judgment will be affirmed.

Judgment affirmed.

35	448
138a	187
35	448
50	267
50	306
35	448
54	644
35	448
57	343
35	448
59	42
35	448
63	47

F. M. ATKINSON

v.

THE LINDEN STEEL COMPANY ET AL.

Practice—Insufficient Transcript.

This court declines to consider the case presented, for the reason that the record filed is not certified to as being a full copy or transcript of the record in the case.

[Opinion filed March 10, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. S. P. McCONNELL, Judge, presiding.

Messrs. G. W. & J. T. KRETZINGER, for appellant.

Messrs. TRUMBULL, WILLITS, ROBBINS & TRUMBULL and COOK & UPTON, for appellees C. H. Ferry and Union National Bank.

GARNETT, J. The record filed by appellant in this case is not certified to be a full copy or transcript of the record, but a "complete transcript of the record as per præcipe for record

Cartier v. Troy Lumber Co.

filed." Appellees subsequently filed an additional record, but that is only certified to be a copy of a certain cross-bill, answer, amended and supplemental cross-bill, and of certain orders in the cause. No case is presented, therefore, upon which we can find that any error was committed, as it is impossible to say that we have a complete record before us. Frink v. Phelps, 4 Scam. 558; Bertrand v. Taylor, 87 Ill. 235; Blake v. Miller, 18 Ill. App. 645.

The decree is affirmed.

Decree affirmed.

ANTOINE E. CARTIER

V.

THE TROY LUMBER COMPANY.

Sales—Lumber Plant—Fraud—Enumerators—Bribery—Evidence—Instructions—Practice.

1. Only prejudicial errors justify reversal.
2. Whether upon the evidence a certain agreement amounted to the abrogation of a previous contract is a question of fact for the jury.
3. In an action brought to recover damages for the alleged fraud of the defendant, growing out of the bribery of enumerators chosen by himself and the plaintiff to determine the amount of timber and logs on certain land, to the end that they should underestimate the same, a contract of sale thereof from plaintiff to defendant having been previously entered into, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff.
4. Where a jury takes figures from the calculations of counsel on both sides of a case on trial, one of the parties can not complain thereof.
5. An instruction requiring the plaintiff to prove his case by a clear preponderance of the evidence is too strongly worded.
6. Instructions informing the jury as to what they may or may not infer from the non-production of books and papers, should not be given.
7. It would seem that the control of a court over the addresses of an attorney in a given case, is limited to confining him in his opening to what may fairly be anticipated as probably coming in issue during the trial upon the facts as the advocate states them, and in his closing to the evidence which has been put in, and in both, preventing obscenity and profanity, and within very indefinite bounds, restraining license and intemperate speech.

35	449
44	344
138	533
35	449
51	466
35	449
68	254
35	449
71	553

[Opinion filed March 10, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

MESSRS. THOMAS BATES, D. V. SAMUELS, E. E. BENEDICT and T. J. RAMSDELL, for appellant.

MESSRS. TENNEY, HAWLEY & COFFEEN, for appellee.

GARY, P. J. In 1883 the appellees and the appellant made a contract for the sale, by the former to the latter, of a large lumber plant in Michigan for \$190,000, provided the timber and logs on the land should be fifty millions of feet or more; the amount of such timber and logs to be determined by an estimate to be made by two estimators, each party to select one, who, if they could not agree, were to select a third; and in case the estimate should be less than fifty millions, then for each thousand feet less a reduction of \$2.25 per thousand to be made from the price. The terms were \$50,000 down, and the residue in three annual payments, with seven per cent interest, and secured by mortgage on the property. The appellees selected one Nielan and the appellant one Stronach as estimators, and the estimates were, by the former, 27,050,000 feet, and by the latter, 25,770,000 feet. Urged by the president of the appellees, and with the assent of the appellant, the estimators, instead of selecting a third estimator, came together, and between themselves agreed upon 26,665,441 feet, which the parties accepted. The appellant had paid \$1,000 to the appellees to be applied on the first payment of \$50,000, and professed, when the estimate was settled upon, to be so much dissatisfied with the result, as the quantity fell so much short of what had been expected, and timber and logs were the principal inducement to him to purchase, that he was willing to forfeit the \$1,000 and abandon the trade. The appellees seem to have been very anxious to sell, and, after negotiations, the parties agreed to consummate the sale, the appellees abating \$5,000 of the price, and the sale was

then made in substantial accordance with the previous contract.

June 1, 1888, this suit was commenced, based upon the charge that the appellant bribed the estimators to make an estimate several millions of feet less than the quantity of timber and logs they actually found, by means of which the appellees were deceived, and defrauded out of a large sum of money. The appellees obtained a verdict and judgment, but as in the motion for a new trial there was no reason assigned that the verdict was excessive, that is not a question in the case.

The first point made in the brief for the appellant—that the court should have given at his request an instruction “that under the law and the evidence the plaintiffs could not recover”—is based upon the assumption that the negotiation ending in an abatement of \$5,000 of the price, was an abandonment of the preliminary contract, and that therefore the declaration, charging fraud in the means by which they were induced to carry it out, with a total reduction of \$57,501.75 from the contract price of \$190,000, was not proved. Whether, upon the evidence, that assumption was true or not, would in any case have been a question of fact for the jury, and not of law for the court.

But the jury would not have been justified in finding the assumption true. The contract contemplated that there might be a shortage in the quantity of timber and logs, and consequent reduction in the price; and the only modification of the original contract was, that as that shortage so far exceeded expectation, a further reduction of \$5,000 was made in the price. It is undoubtedly true, as appellant's counsel allege, that much of the testimony on the part of the appellees came from very suspicious sources, but the credibility of witnesses is for the jury.

The court could not have directed a verdict for the defendant because the witnesses for the plaintiff were not worthy of belief.

The record of the evidence in this case consists of nearly nine hundred pages. A few minor questions are made upon

the evidence, which have been considered, but the time and space necessary to review them in detail would not be usefully devoted to that purpose. There are two serious and important questions on the record. The first to be considered is on this instruction, given for the appellees:

"If you believe from the evidence that the defendant, Cartier, has in his possession or under his control, so that he might have produced them, books or papers which contain evidence material to the case, which he has not produced in evidence, you have a right to presume that such books and papers, if produced in evidence, would be injurious to his case, unless you find that such presumption has been refuted by the other credible evidence in the case."

This comes very near if it does not pass the danger line. *E. & W. G. R. R. Co. v. People*, 96 Ill. 584. It ought not to have been given. The practice of instructing the jury as to what they may or may not infer from circumstances in evidence is one not warranted by the statute. Sec. 51, Practice Act.

But it does not follow that the judgment is to be reversed because it was given. The principle that "courts of review reverse only for such errors as may have been prejudicial to the complaining party" (*Heckle v. Grewe*, 125 Ill. 58), has been so often repeated in the reports of this State, that it would be mere ostentation to cite cases.

For two reasons this instruction did no harm.

The first is that it is true, and would be a proper direction to a jury under the common law system, where the judge sums up and comments upon the evidence, aiding the jury to the extent of his ability in arriving at a right conclusion. Secs. 2292-2294, 2 Thomp. Trials; 3 Ch. Gen. Pr. 913. Courts of equity constantly act upon such presumptions everywhere. *Gage v. Parmelee*, 87 Ill. 329.

The second is that the verdict would have been the same without as with this instruction. This proposition requires some statement of the evidence, and also something of a history of the trial. And the main burden of the complaint of the appellant relates to the manner in which the case was tried.

It must be conceded that the two addresses of the advocate who opened and closed the case before the jury, were remarkably energetic. The argument of an advocate will, as to the matter of it, be determined by his ability and education as a lawyer; as to the manner of it, by his taste and education as a gentleman. The control of the court over it is probably limited to confining the advocate, in his opening, to what may fairly be anticipated as probably coming in issue during the trial upon the facts as the advocate states them; and, in his closing, to the evidence which has been put in; and in both, preventing obscenity and profanity, and within very indefinite bounds, restraining license and intemperate speech.

If the evidence during the trial places either the opposing party or a witness in an unfavorable light before the jury, whether he shall attack with the coarse bludgeon of abuse or the more polished weapon of sarcasm—whether he shall denounce or ridicule—must be left for him to determine. The court can neither dictate a good argument nor prevent a bad one.

The corrective which the wisdom of the common law provided against the intemperance of counsel has been abolished in the greater wisdom of the Legislature, and that “summing up of the judge” to which Chitty attaches such importance, is no longer allowed to aid the jury to come to “a just conclusion.”

It could be readily seen that if, upon the trial, the appellees should succeed, without calling either of the estimators as a witness, in making probable the charge that the appellant had bribed them, he would be almost compelled to call them, if accessible, in his own defense. In his opening, the appellees’ counsel said that he expected the appellant would put Stronach on the stand.

“I want to state this right here—we expect to prove if they do—and I want it understood that this is on the theory that they put Mr. Stronach on the stand—of course, if they notify me that they do not intend to produce him as a witness, I have nothing to say. But I shall assume that they intend to put him on the stand until I am notified to the contrary.”

Then he paused a moment, and no reply being made by counsel for appellant, he went on with a detail of negotiations between the appellees—through attorneys D. K. Tenney and McPherson—and Stronach, during which, Stronach having confessed the bribery, they had offered Stronach: “If you will produce those documents and that estimate, and make a clean breast of it, just as it is, we will pay you \$4,000.” Among the documents, as counsel stated, was a letter from Nielan to Stronach impliedly admitting the bribery. Witnesses for appellees, conceded to be of doubtful credibility, but in a position to know the matters of which they spoke, testified that the appellant paid Stronach \$2,000 and promised Nielan the same, who did not want to take the money immediately, and the \$4,000 was charged on the books of the appellant as expenses, and the \$2,000 for Nielan credited to “bills payable” to “N.,” and that in a written contract for a partnership in about half of the lands, half of the \$4,000 was charged to the partnership. That when the estimates were made, Stronach prepared maps of the parcels of land, with the quantities of timber and logs upon them, respectively, of which the total footings were about 37,000,000 to 38,000,000 feet, which maps the appellant kept. This testimony was in depositions taken long before the trial, so that the appellant had ample notice of it. It was a fair conclusion upon the evidence relating to that subject that \$2,000 was ten times a fair compensation for the services of Stronach. On the trial the appellant was a witness, and admitted the payment of \$2,000 to Stronach; did not deny the charge of expenses in the partnership contract; admitted that that contract was in the hands of his attorneys in Michigan; admitted the credit to “N.” in his books, but denied all knowledge of how or why it got there or what it meant, but did not produce his books or the contract. He denied possession of Stronach’s maps, and said Stronach kept them. He called Nielan as a witness, but not Stronach, though it appeared that he and his attorneys had been in communication with Stronach during the trial, and the attorneys produced what they called the sectional maps, which they said they had obtained from Stronach during the

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trial, and offered them to the other side to put in evidence, but without any evidence that they were the originals. No reason for not calling Stronach appeared. There was no direct evidence of the pecuniary condition of the appellant. In the closing argument of the counsel for appellant, he said that Stronach's absence, coupled with the offer stated in the opening for appellees, showed either that Stronach was frightened away by the opening statement, or that the appellees had paid him his price to keep him from testifying. That the case was a blackmailing conspiracy, and D. K. Tenney knew it and was helping it through. That the appellees had to bring counsel down from Wisconsin to lend respectability to the case. That the appellant, by his industry and honest dealings, had amassed a fortune and won the confidence of all his acquaintances.

Through the door thus opened by the counsel of the appellant, the counsel for the appellees marched. He made a statement as to the wealth of the appellant, but that could only affect the amount of damages if vindictive damages were given, and, as before stated, the amount of damages is not a question in the case. All the rest of his speech, with one exception—to be stated—was either comment upon or inference from what appeared during the trial before the jury.

The comments were sometimes coarse; the inferences may or may not have been just, but he had the right to urge them upon the jury. The exception alluded to is as follows:

"My friend * * * says that there is one of two theories, either of which will account for Stronach's absence. First, that the plaintiffs have frightened him away; and second, that he has been paid his price, and therefore remains away. We did try to get Stronach to come here. Why? Not because we cared a continental for his oral testimony. I wouldn't give a snap of my finger for a man who has deliberately committed such an outrageous fraud as this, to go on and admit it. What did we want? He had gone to Mr. McPherson and stated to him that he had the sectional maps, and that he had a letter from Nielan giving the whole thing away. The letter of Nielan and the sectional maps we wanted

because, gentlemen of the jury, those two things combined prove our case.

"They say here that Mr. Stronach has been frightened away, or has been paid his price to keep away. Why, gentlemen of the jury, if we had gone over there and tried to do anything corrupt, and Mr. Stronach was on the other side, why he would come in here and go on the witness stand and swear that we had gone over there and offered him money to come in here and perjure himself. Don't you see? It would give our case a terrible black eye if we didn't have testimony to show the true inwardness of the scoundrel. If he was honest was there any reason why he should stay away and fear going upon the witness stand? No, that theory won't wash. Take the other—that he has been paid his price—and yet my friend * * * , my friend * * * has been in constant communication with Stronach, and has been confidentially getting hold of some things—some little sectional maps that Mr. Stronach made in 1883."

The counsel for the appellant, having made the opening on the part of the appellees the basis of a part of his argument to the jury, both in his reference to D. K. Tenney and to the probable causes of the absence of Stronach, authorized a reply to that argument upon the same basis.

The appellant's counsel having assumed that the absence of Stronach was to be attributed to facts derived from that opening, warranted a reference to the context as the basis of an argument that the presence of Stronach was desirable by the appellees. Both parties, on the trial—the appellant first—asked the jury to take figures from the calculations made by counsel, which the jury did; the appellant can not now complain of that. Other matters complained of are of minor importance, and this opinion is already too long. The testimony of Walkup as to conversations with Lyon, was in reply to the testimony of Lyon as to those conversations; the letter from Nielan to Lyon is not in the record, and, if for no other reason, can not be considered because the court can not see that it is relevant.

The instructions asked by appellant requiring the appellees

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to prove their case by a *clear* preponderance of the evidence, is too strong. *Crabtree v. Reed*, 50 Ill. 206.

There is no error in the case which could have affected the result, and the judgment must be affirmed.

Judgment affirmed.

MORAN, J., dissenting. It is the policy of the law to secure to parties who come into courts for the settlement of their disputes, a fair trial. The approval of a verdict secured by unfair means must necessarily lead to an impure administration of justice. It is the constant practice of reviewing courts to set aside verdicts when incompetent testimony has been permitted to go to the jury for their consideration, and this is done upon the theory that irrelevant or incompetent matter having been introduced into the case, the party against whom the verdict has gone has not had a fair trial; that there has been no just test of the merits upon relevant and competent evidence.

In the class of cases in which the prejudice or passion of a jury is easily aroused, the rule that the verdict should not stand where any improper element has been wrongfully forced into the case, by party, court or counsel, finds most just and frequent application. This case belongs to that class. The charge is fraud, the amount claimed large, and the facts alleged against the defendant of a nature well calculated to awaken indignation and give rise to prejudice.

The evidence is conflicting, and upon points essential to appellees' case it does not seem to me to at all preponderate in their favor. Appellant appears to have admitted, at all times and to every person who inquired of him with reference to it, that he paid to Stronach \$2,000 for estimating the timber on the land which he purchased from appellees. Allowing that to be an excessive price, and that it indicates that Stronach was corrupted, yet it does not make out the case. It is still necessary to show that Nielan was reached and bribed to return a false estimate.

Nielan went upon the stand and testified to the honesty of his estimate, and denied that he was paid any money by appel-

lant. There was no evidence in the record which tended to impeach the character of Nielan. He stood before the jury as a witness fair in character and practically uncontradicted by evidence in the case. But the statements of appellees' counsel, in the opening and closing of the case, as completely blasted Nielan's character before that jury, and as effectually contradicted his evidence on the stand, as the introduction of a letter in Nielan's handwriting and signed by him, in which he stated, in terms, that he had been bribed by appellant and had returned a false estimate on the land, would have done. The counsel's opening may have been legitimate when considered by itself, and it may be true that a portion of the closing argument to the jury was but a fair answer to the argument of appellant's counsel. But the most telling and injurious part was not, in my opinion, either invited or excused by anything that appellant's counsel had said. Nothing said by him justified the direct and positive statement to the jury, by appellees' counsel, in telling why he wanted Stronach as a witness, made in these words: "He had gone to Mr. McPherson and stated to him that he had the sectional maps, and that he had a letter from Nielan giving the whole thing away. The letter of Nielan and the sectional maps we wanted, because, gentlemen of the jury, those two things combined prove our case." Counsel was quite right in saying that these two things proved the case. Indeed, a letter from Nielan giving the whole thing away would prove the case without the maps. But the letter from Nielan was before the jury by the statement of counsel as fully, and as injuriously for appellant, as if it had been produced and read to them.

While it is true that the credibility of witnesses is for the jury, it is to be judged of by the jury in view of all the *competent* evidence in the case. Nielan's credibility was weighed with a belief in the minds of the jury that he had written a letter, in terms acknowledging his guilty participation in the alleged fraud. There was not one word of legitimate evidence before the jury that reflected upon Nielan's honesty or truthfulness. Suppose no word had been said during the trial about the alleged letter, is it possible for this court to say that

the jury would not have believed Nielan? Is it just or fair to assume that without this illegitimate but crafty and effective attack upon him he would not have been believed? It is admitted "that much of the testimony on the part of the appellees came from very suspicious sources." How, then, can it be said, as an affirmance of this judgment in effect does say, that the verdict would have been the same had the trial been fair?

Considering the opening and closing arguments of counsel together—as, in view of the unwarrantable and inexcusable statement above quoted from the closing they must, in my opinion, be considered—and it appears to me an inevitable conclusion that the jury was influenced to an extent practically impossible to estimate against the defendant and his witnesses. The court directed that the counsel should not be interrupted in his closing speech, and was, during the making of said speech, absent from the court room hearing some motions, and thereby the privilege and advantage of timely protest against statements of matter not in evidence was denied to appellant. The effect of the order of the court which secured to counsel immunity from interruption should be to compel him to use his privilege with an honest observance of the responsibilities it imposed, and to confine him strictly to a discussion of the *evidence* in the case.

To approve of such statements as were made in the case apparently for the purpose of affecting the deliberation of the jury, or of influencing their passions or prejudices, or otherwise leading them to decide the question on matter which the jurors' oath and the judge's duty both required should not enter into their consideration, is, as it seems to me, a departure from the primary principles of justice. When such acts are not restrained or corrected by the trial judge, and it may be said that such acts are not errors of the judge (*McDonald v. People*, 25 Ill. App. 377), this court ought to follow the course of the Supreme Court of Iowa, when a similar question was presented in *Martin v. Orndorff*, 22 Iowa, 504, when the court said: "We therefore deem it the safer and better course to hold that it was error of prejudice, and to check and

disabuse a practice to which we have witnessed an occasional tending, and which, if indulged in, would cause a departure from long and well settled rules." I am of opinion, too, that the instruction given with reference to the presumption to be indulged in from the failure of defendant to produce his books, was an erroneous and injurious suggestion, under the facts in this case. The only item or charge which appellees claimed was in defendant's books which tended to support their witnesses, was the item of \$2,000 credited to bills payable, "N." This item defendant frankly admitted, when on the stand, was in the book, and said that he was unable to explain it. The fact of the existence of the charge or item being thus admitted, what basis was there for the damaging suggestion that the jury might presume the books would be to some further extent injurious to defendant?

The effect of such a hint from the court might well lead the jury to find in the authorized presumption all the evidence which they might believe was otherwise lacking in the case. Instructions of this nature are usually regarded as invasions of the province of the jury. And when given under such circumstances as appear in this case, they strike, with a force not readily estimated, the party against whom they are aimed. I am therefore unable to say that the judgment appealed from should stand. If there had been nothing improper on the trial, the evidence having been conflicting, the verdict would be conclusive, but a verdict is conclusive in such a case only when there is no error and the trial has been fair.

THE CHICAGO CITY RAILWAY COMPANY

V.

FRANK BRADY.

Street Railroads—Negligence—Personal Injuries—Evidence—Instructions.

1. Negligence is a question of fact for the jury, and when the evidence is conflicting their verdict is conclusive.

2. In an action brought to recover from a street railroad company for personal injuries alleged to have been occasioned by its negligence, one of its trains having collided with the wagon of the plaintiff, this court declines, in view of the evidence, to interfere with the verdict in his behalf.

[Opinion filed March 10, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

MESSRS. W. J. HYNES and C. M. HARDY, for appellant.

MR. W. H. CONDON, for appellee.

GARY, P. J. The frequent reiteration of the propositions that negligence is a question for a jury, and upon conflicting evidence their verdict is conclusive, deprives them of all novelty, but does not impair their soundness. They are applicable to this case.

The appellee was driving a loaded wagon on State street. He drove his wagon from the south upon a scale in the east side of the street, a short distance south of 33d street, and the scale being short he went too far, so that the fore-wheels of the wagon went off. With the load that was on the wagon he could not back on the scale, so drove north and turned in the street to come back on the scale from the north. In so doing he went upon the tracks of the street railway, and at the time of the accident which is the subject of the present investigation, his wagon was moving eastward across the east track. A cable car coming from the north on that track struck the wagon; the appellee fell off, and the consequence to him, as the evidence tends to prove, is total disability for life. The controversy between the parties is as to which was negligent, and in what degree, and the jury have found for the appellee, upon such conflicting evidence that their verdict either way would be conclusive.

It is a chronic complaint, in which the courts sometimes join (*Ill. Cent. v. Welch*, 52 Ill., 183 is an instance), that juries do not treat railway companies fairly. Whether the frequent complaint is a just accusation that in the trial of actions

against them they do not endeavor to fairly submit the merits to the intelligent judgment of the jury, but seek for safety by multiplying the technicalities of legal procedure, is a question not to be discussed here. The law makes the jury the tribunal to determine the facts. The statute of this State contemplates that they will discharge the duty, at the close of heated and ingenious arguments of opposing counsel, better by being furnished with a few written propositions of what the law applicable to the case is, than by having a careful and impartial *resume* of the whole case presented to them by an experienced judge.

On the trial of this case the appellant asked twenty instructions. Of these the court gave ten without modification; four with modifications, and refused six. Of the instructions given at the instance of the appellee, the brief of the appellants makes no complaint.

This opinion may fitly conclude with the concluding sentences of the opinion of the Supreme Court in *Fisher v. Stevens*, 16 Ill. 397: "Numerous instructions were asked upon the trial, some of which were given and some refused. Fisher asked for sixteen several instructions, seven of which were given as asked, three given after qualifications by the court, and the balance refused.

"The only question of law was as to the liability of Fisher to pay for bricks obtained for him and used for his benefit. The right to demand instructions must have some limit, and we are not disposed to sanction its abuse. Sixteen instructions in this case could not have been required on the part of the defendant for the purpose of merely enlightening the jury upon the law of the case, and were well calculated to confuse and mislead them. As we think the court correctly instructed both for the plaintiff and defendant, so far as conducive to justice and a fair trial, we do not deem it our duty to enter upon an investigation of the law of the instructions refused." *Prior v. White*, 12 Ill. 261.

Judgment affirmed.

COMMERCIAL NATIONAL BANK

v.

FRANK P. HAWKINS.

Sales—Real Property—Commission—Recovery of—Agency—Evidence.

In an action brought for the recovery of commissions, alleged to have been earned by the plaintiff on the sale of real estate made through his agency, this court holds, in the absence of evidence going to show that he in any way influenced the sale in question, that the verdict in his favor can not stand.

[Opinion filed March 10, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. WILLIAMS, HOLT & WHEELER, for appellant.

Messrs. W. W. GURLEY and WILLIAM GARNETT, JR., for appellee.

GARY, P. J. The record shows substantially this: There were two associations of patriotic citizens in Chicago, one named the Citizens Association, and another the Commercial Club.

The former had under consideration a project to have the State acquire lands in the vicinity of Chicago for the use of the State Militia. The appellee learned of this, and at his instance the appellants retained him as an agent to negotiate a sale of land which they owned. The quantity which it was supposed the State would need was about 200 acres.

During the years 1884 and 1885 the appellee was very diligent and spent a great deal of time in endeavoring to make a sale, but with no success. Among his efforts was his assistance in organizing an excursion to the lands by State Militia officers, who went October 26, 1885, and in which Gen.

Schofield, of the United States Army, and then in command of this department, joined. And whatever influence this excursion may have had upon Gen. Schofield was the only connection the appellee could have had with the subsequent sale of the lands. But it is clear that whatever influence Gen. Schofield himself had upon that sale, had been exerted before that excursion, and therefore the appellee can claim nothing on that score.

In the spring preceding that excursion, at meetings of the Commercial Club, Gen. Schofield had addressed the club on the subject of the establishment of a United States Military post in the vicinity of Chicago, and that club followed up the matter by the appointment of committees to select ground and raise money with which to purchase, with such effect that in October, 1887, nearly 500 acres were purchased from the appellants by the club, and accepted by the United States as a location for a military post. But with that purchase and acceptance Gen. Schofield had no connection. He had been transferred and Gen. Terry had succeeded him, and Gen. Sheridan, Gen. Terry and Col. Lee acted in the matter of the selection of lands for the post.

The appellee does not claim that he is entitled to pay on a *quantum meruit*, for the labor he performed. His claim is for commissions earned on the sale made through his agency. Beyond the inappreciable extent to which he may have contributed to intensify public sentiment as to the expediency of having a military force in the vicinity of Chicago, what he did in no way had any connection with the sale which the appellant made of its lands, and he is not entitled to such commissions. There is no evidence in support of the verdict in his favor for them.

The judgment must be reversed and the cause remanded.

Reversed and remanded.

Judge GARNETT takes no part in this decision.

PAUL KOCH

V.

THE NATIONAL UNION BUILDING ASSOCIATION ET AL.

*Landlord and Tenant—Lease—Renewal—Agreement for—Corporations
—President—Authority of—Statute of Frauds—Agency—Evidence.*

1. The president of a corporation has not, as a matter of law, and merely by reason of his holding such office, power or authority to execute deeds, mortgages or leases of the real estate thereof.

2. The presumption that an act done by the president of a corporation is legally done and binding upon it, arises only in the absence of legislative enactment or provision made in its by-laws, touching the subject-matter of the act in question.

3. The president of a corporation may perform all acts which are incident to the trust reposed in him, such as custom or necessity has imposed upon his office, without express authority.

4. The fact that a contract made by an agent without authority, has been performed by the other party, can not, of itself, render the contract binding on the person for whom the agent assumed to act.

5. Upon a bill filed for a specific performance of an alleged agreement by the president of a corporation owning a certain building, to renew a lease, this court declines, in view of the fact that such officer did not have authority to grant such renewal, to interfere with the decree dismissing the same.

[Opinion filed March 10, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Messrs. RUBENS & MOTT, for appellant.

Messrs. HAMLINE & SCOTT, for appellees.

MORAN, J. One Henry Breuggestadt conducted a saloon and restaurant at No. 70 Adams street, in Chicago, of which premises he had a lease from the National Union Building Association, which was to expire April 30, 1889. In September, 1888, appellant was in negotiation for the purchase of said saloon and restaurant business, and the stock and fixtures

thereof, and was willing, as he claims, to purchase the same for the sum of \$4,500 provided he could obtain a renewal of the lease of the premises for two or three years, but was unwilling to purchase unless he could obtain such renewal. Before making the purchase, appellant claims that he called on Frank N. Gage, the President of the National Building Association, and stated to him that he was about to buy out said Breuggestadt for said sum of \$4,500, of which the greater part was to be paid for the good will of said business, and that he would not buy unless he could obtain a renewal of the lease for two or three years; and thereupon said Gage promised such renewal on condition that appellant would keep as good a place as Breuggestadt kept; that if he did so there would be no trouble about a lease, and he could have it in January, 1889. That he relied upon said promise of said Gage, and purchased the business and fixtures, paying therefor the said sum of \$4,500, and that the lease of said Breuggestadt was assigned to him with the consent of said National Building Association, and thereafter he paid to said association the rent reserved in said lease. That in January, 1889, appellant demanded the lease for three years so promised him by Gage, and was told by Gage that the lease would be prepared.

In February he was notified by the secretary of the association that he would be expected to vacate the premises at the expiration of his lease, April 30, 1889, the association having decided not to rent to any person for saloon purposes. Appellant claims that he kept as good a place as Breuggestadt had kept, and that it was not claimed by the association that he had not, or that he failed to keep an orderly place. After the notice to surrender possession, appellant made efforts to obtain a lease for an additional period, but without success, whereupon he filed his bill for specific performance of the alleged agreement with Gage for a lease, setting out in substance the facts above stated, and claiming that it would be a fraud on him if the association did not execute a renewal of the lease, and would cause great loss and damage. The bill was answered by the association and by Gage, and in both answers it is denied that any such agreement as appellant

Koch v. National Union Building Ass'n.

claims was ever made with Gage, and it is also set up that Gage had no power or authority, as president of the association, to make leases or agreements for leases for the real estate of the association. On the hearing there was a conflict in the evidence as to whether Gage ever agreed that appellant should have a renewal of the lease; and in the brief the counsel have discussed very fully the testimony relating to that issue, and the question whether the purchase by appellant of the premises, relying on such a promise of renewal, and taking an assignment of the then existing lease, was such a part performance as would take such a verbal agreement without the operation of the statute of frauds.

We do not find it necessary, in the view we are compelled to take of the case, to pass upon this question of fact, or to consider whether, assuming the agreement to have been made by Gage as appellant contends it was, equity would, upon the facts alleged, enforce the contract on the ground of its part performance.

The decree of the court below dismissing the bill must be sustained, without reference to the statute of frauds, because of the lack of power or authority in the president of the association to bind it by an agreement to make or renew a lease of its estate.

The president of a corporation has not, as a matter of law, and merely by reason of his holding said office, power or authority to execute deeds, mortgages or leases of the real estate of the corporation. *Hoyt v. Thompson*, 19 N. Y. 207.

"The implied powers of the president of a corporation depend upon the nature of the company's business, and the measure of authority delegated to him by the board of directors. It seems that a president has no greater powers by virtue of his office merely, than any other director of the company, except that he is the presiding officer at the meeting of the board." *Morawetz on Corporations*, Sec. 537.

There is no proof in the record as to what the business of the National Union Building Association is, but it is shown that its business, whatever it may be, is carried on under certain by-laws, Sec. 9 of which by-laws relates to the duty of the

president, and, among other things, provides that "He shall execute all bonds, contracts, leases or other instruments required to be made or executed by authority of the board for and on behalf of the association, which shall also be signed by the secretary."

Here we find the authority of the president with reference to executing leases defined, and, while it is true that it has been said by the Supreme Court of this State that an act done by the president will be presumed to be legally done and be binding on the body, that rule applies "in the absence of legislative enactment or provision made in the by-laws." *Smith v. Smith*, 62 Ill. 493.

The business affairs of corporations are controlled exclusively by their boards of directors, and such a board may undoubtedly invest the president with authority to bind the corporation by deed or lease, either by express resolution or by an acquiescence in his assumption of authority in that respect, which would justify persons who dealt with him in the inference that he had such authority in fact. So, if the act is one incident to the execution of the trust reposed in him, such as custom or necessity has imposed upon his office, he may perform it without express authority. *Mitchell v. Deeds*, 49 Ill. 416.

As we understand *Union Mutual Life Ins. Co. v. White*, 106 Ill. 67, it simply holds the corporation bound by acts which, from the course of its business, were within apparent power of the president and general agent when those officers were acting for the corporation in a State where the corporation was doing business by comity, the home or residence of the corporation being in another State.

Appellant sought to prove that Gage had been recognized by the association as having authority to lease its tenements, and that various transactions for leases had been made by him with tenants without consultation with or dictation from the board but in this he, in our opinion, signally failed. It is very clearly shown that in every one of the instances mentioned the transaction was with the board, and that Gage never, in any instance, assumed to contract for the corporation, but

Farwell v. Wadsworth.

only to negotiate and to present matters to the board for approval, and that he was never, in any manner, held out as having power or authority to make leases or contracts binding on the corporation. It is not contended that the alleged contract of appellant with Gage for a renewal of the lease was in any manner ratified or adopted by the corporation. The case, then, in its most favorable aspect for appellant is, that a contract was made with him by one who assumed authority without having it in fact, to give him a renewal of the lease, and that, relying on the contract, he has changed his position for the worse, and done, as he claims, acts in performance of the contract.

The fact that the contract made by an agent without authority has been performed by the other party, can not, of itself, render the contract binding on the person for whom the agent assumed to act. The difficulty is that the contract to lease was not binding because of lack of authority in Gage to make it, and without reference to the fact that the statute of frauds requires such a contract to be in writing.

The decree of the Circuit Court will therefore be affirmed.

Decree affirmed.

JOHN V. FARWELL

V.

DANIEL F. WADSWORTH ET AL.

	35	469
	139	328
85	469	
102	518	
102	521	
102	529	

Creditors' Bill—Corporation—Judgment against—Stockholders in Other States—Recovery from Unpaid Stock—Michigan—Law of May 11, 1877.

Upon a bill filed to compel the defendant to pay to the complainants the amount due them upon a judgment recovered by them against a mining company, a corporation organized under the laws of another State, it being contended by them that said defendant owned stock in said corporation which had not been paid for, to an extent more than sufficient to pay said claim, this court holds, that under the statute of said State, no personal liability existed on the part of the defendant, and that the decree against him can not stand.

[Opinion filed March 10, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding.

Mr. GEORGE F. WESTOVER, for appellant.

In the State of Illinois, unless there be some peculiar circumstances strongly appealing to equity, which take the case out of the general rule (as possibly in *Hicklin v. Wilson*, 104 Ill. 54), no action will lie against a stockholder of an insolvent corporation, to enforce the payment of his liability for unpaid stock subscription, unless a court of equity, having jurisdiction over the corporation, shall have taken an account of all its assets and liabilities, and shall have ascertained the amount necessary to be paid by each stockholder, to cancel its debt; and these preliminaries having been adjudged in equity, the recovery against the several stockholders must be limited to the amounts stated in the decree. *Lamar Ins. Co. v. Moore*, 84 Ill. 576; *Lamar Ins. Co. v. Gulick*, 102 Ill. 41; *Patterson v. Lynde*, 112 Ill. 205; *Great Western Telegraph Co. v. Gray*, 122 Ill. 630, and cases cited *post*.

The statute of Michigan under which the corporation at bar was organized, provides that subscribers for stock shall be liable to pay calls made upon their subscriptions by the board of directors; therefore there can be no action against a stockholder to enforce unpaid subscription for stock, without either an assessment and call by the company, or an order by some court of competent authority, having jurisdiction of the corporation, fixing the amount of the liability of the several stockholders. *Scovill v. Thayer*, 105 U. S. 155; *Adler v. The Milwaukee P. B. M. Co.*, 13 Wis. 63, and cases cited below.

It is conceded that, if the appellant be liable for unpaid stock subscription, it is by virtue of the provisions in the act of the Legislature under which the corporation was organized. The laws of Michigan having provided, limited and defined that liability, and having prescribed a remedy for its enforcement, all other remedies are excluded.

The laws of a foreign State operate beyond its territorial limits only *ex comitate*.

The courts of a State, where the laws of such a foreign State are sought to be enforced, will use a sound discretion as to the extent and mode of that comity. They will not permit their tribunals to be used for the purpose of affording remedies which are denied to parties in the jurisdiction of the State that enacted the law, and which tend to operate with hardship on their own citizens and subjects. *Rice v. Merri-mac H. Co.*, 56 New Hampshire, 114; *Erickson v. Nesmith*, 4 Allen, 233; *Erickson v. Nesmith*, 15 Gray, 221; *Patterson v. Lynde*, 112 Ill. 196; *May v. First Nat. Bank*, 122 Ill. 551.

Messrs. DOOLITTLE, McKEY & TOLMAN, for appellees.

A judgment creditor of an insolvent corporation may proceed by creditor's bill on his judgment, against the corporation, and one or more stockholders less than the whole, to recover the amount of his debt, without an account being taken of other indebtedness, without bringing in all the stockholders for contribution, and without "winding up" the corporation. *Hatch v. Dana*, 101 U. S. 210; *Wait on Insolvent Corporations*, Sec. 78, and notes; *Cook on the Law of Stock and Stockholders*, 1st Ed., Sec. 206 B, and note 3, page 192, and authorities there cited; also Secs. 204 and 205, and notes; *Ogilvie v. Knox Ins. Co.*, 22 How. 380; *Marsh v. Burroughs*, 1 Wood, 468; same case, 10 American Law Register, 718; *Bartlett v. Drew*, 57 N. Y. 587; *Brundage v. Monumental Silver Co.*, 12 Oregon, 322; same case, 7 Pacific Rep. 314, and cases therein cited and reviewed. 1 *Morawetz on Corporations*, Sec. 315; 2 *Morawetz on Corporations*, Secs. 821 and 864; *Pierce v. Milwaukee Construction Co.*, 38 Wis. 253; *Ervin v. Oregon R. & N. Co.*, 20 Fed. Rep. 577-582; *Hollingshead v. Woodward*, 35 Hun, 410; *Pettibone v. McGraw*, 6 Mich. 441.

This doctrine approved in Illinois. *Clapp v. Peterson*, 104 Ill. at page 35, cites and approves *Hatch v. Dana*, *Marsh v. Burroughs* and *Bartlett v. Drew*.

Same cases also cited and approved in *Hickling v. Wilson*, 104 Ill. 54; *Patterson v. Lynde*, 112 Ill. 204.

Nor does it make any difference that the corporation is of another State. *Bartlett v. Drew*, 57 N. Y. 587.

A distinction is taken between a bill whose object is, not to settle and wind up the affairs of a corporation, but solely to obtain the payment of the plaintiff's judgment, and a case where the object of the bill is to wind up the corporation.

This is a case of the former character, and the law does not cast the burden of litigation to wind up this corporation upon the complainants here, who seek solely to collect their judgment. See the doctrine very plainly stated in *Brundage v. Monumental Silver Co.*, 12 Oregon, *supra*.

In such a case a court of equity may enforce stock liability, though no regular assessments or calls may have been made by the company; especially in a case like this, where it appears by the evidence that the attempts to enforce calls were rendered futile by the efforts of the representatives of the complainants in this case.

GARY, P. J. In June, 1881, the Chicago Mining Company was organized as a corporation under the laws of the State of Michigan. June 23, 1881, six certificates, for one thousand shares each, of stock in the corporation, were issued to "William Sturges, trustee." Two days later three of them were surrendered by Sturges, and a new certificate for three thousand shares was issued in the name of the appellant.

This certificate was delivered by Sturges to the appellant, as, so far as any evidence shows, collateral security to him for the payment of \$17,500. When that delivery was made does not appear, but it must have been some time later than the day the certificate was issued, the issue having been in northern Michigan, and the delivery in Chicago. Upon the testimony of the appellant—"My impression is, the stock was transferred to my name. He subscribed it originally to put it in my name. It would not be much collateral unless it was,"—the appellees insist, and the Circuit Court found in effect, that in the original issue, Sturges was a trustee for the appellant. If the appellant was liable on the theory of

that finding and on that alone, its truth might well be questioned.

The appellees are judgment creditors of the corporation, and execution upon their judgment having been returned unsatisfied, have filed this bill to compel the appellant to pay to them so much of the amount unpaid to the corporation on the shares held by him, as will satisfy their judgment. This relief the Circuit Court awarded to them.

It lies at the foundation of the appellees' claim that there should be a personal liability, absolute or contingent upon call of the appellant, to pay to the corporation so much of the par of his shares as had not been paid. Whether he is so liable is to be determined by the law of Michigan.

The 18th section of the act under which the corporation was organized provides that "the board of directors may call in the subscription to the capital stock * * * by installments * * * and if a stockholder fails to pay" the stock may be sold in the mode therein stated. It does not appear that there were any subscriptions for the stock of this corporation. The record does not show any promise as in *Klein v. Alton & S. R. R.*, 13 Ill. 514.

The statute does not in terms make the stockholders liable, and at least two of the judges of the Supreme Court of Michigan, as it was organized three years ago, seem to have been inclined to the opinion that there was no such liability. *Young v. Erie Iron Co.*, 65 Mich. 111.

The legislative intent that the board of directors may call is clear enough in the section cited, but it shows no such intent that the stockholders shall be personally liable to pay, upon which supposed intent the Supreme Court of the United States distinguish the case of *Webster v. Upton*, 91 U. S. 65, from the cases there cited, in which it had been held that no such liability existed.

To the sufficient reason for denying such liability assigned in *Mech. F. & M. Co. v. Hall*, 121 Mass. 272, may be added as especially applicable here, that the statute of Michigan manifestly contemplates, what the geographical situation of the mining region of Michigan and the commercial relations

of manufacturing cities outside of that State with that region, made probable, if not certain, that in the organization of mining corporations, many of the stockholders would be residents of other States. Can it be supposed that the State of Michigan intended to put its own citizens at a disadvantage by imposing a personal disability, readily enforced against its own citizens by the courts of that State, yielding a cheerful obedience to its laws, while as against other stockholders the remedy must be sought in foreign, and perhaps reluctant, tribunals?

Holding that no such personal liability exists under the statute of Michigan, it follows that the decree appealed from is erroneous, and it is therefore reversed and the cause remanded, with directions to the Circuit Court to dismiss the bill at the cost of the appellees.

Reversed and remanded.

THE UNITED STATES ROLLING STOCK COMPANY

v.

GEORGE P. CHADWICK.

Master and Serrant—Negligence of Master—Dangerous Machine—Personal Injury—Assumption of Risk—Pleading—Evidence—Instructions.

1. If the plaintiff in a given cause recover a verdict upon a declaration containing any good count, with evidence applicable to it, and correct instructions as to the hypothesis upon which he may recover, the verdict can not be disturbed because of a faulty count; but if the evidence be only such as sustains the faulty count, or if the instructions, either by reference to, or recapitulation of the averments of such count, put the right to recover upon the basis, among others, of such faulty count being proved, then, unless the justice of the verdict upon the whole case be clear, the same should not be allowed to stand.

2. Where several counts in a declaration, all good, are referred to by the instruction for the plaintiff, and there is a lack of evidence as to one or more, it devolves upon the defendant to call the attention of the jury to the different allegations of the several counts if he chooses so to do.

35 474
41 332

35 474
50 273
50 689
51 812

35 474
66 669

35 474
70 108

35 474
d92 1568

35 474
98 1858

United States Rolling Stock Co. v. Chadwick.

8. In an action brought by an employe to recover for a personal injury alleged to have been occasioned by his employer's negligence in failing to provide proper machinery and appliances, this court holds, it not appearing upon what ground the same was based, that the verdict for the plaintiff can not stand.

[Opinion filed March 10, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. PLINY B. SMITH, for appellant.

Messrs. BRANDT & HOFFMAN, for appellee.

GARY, P. J. Taking the facts of this case to be just what the appellee represented them to be, he worked for the appellants, running a circular saw, for three months next preceding July, 1887. Then, by accident, a wheel, which was a part of the machinery connected with the saw, was broken, and another put in its place, larger than the former one, changing the action of the machine. He then resumed work at the saw, saying that he thought it would not work; but the foreman told him to work with it until another could be got—would replace as soon as they could; were behind with the work and waiting. And on this order he began work, and in about half an hour his eye was put out by a block thrown by the saw.

It is not made so clear by the whole evidence that there was such a change of wheel, and that the injury of the appellee was a result thereof, that serious errors in the record can be disregarded on the ground that justice is done. Without comment upon the second, fifth and sixth counts of the declaration, it is sufficient for the presentation of the question to be decided to say that the first, third and fourth counts proceed upon the charge that the appellants were neglectful of their duty as to the appurtenances of the saw as it was originally, and that injury to the appellee was a consequence of that neglect. But even if that charge were well founded,

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the appellee had three months' experience with the machine before he was injured, and knew its construction and operation. Having this knowledge, he worked at the machine at his own risk. This law is familiar, and *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417, is enough authority to cite upon it.

The particular defects charged in those counts were in having no guard behind the saw to keep blocks away from it, nor shield in front to prevent them from being thrown against the operator of the machine. If these were defects their existence was obvious at the first glance. The saw itself swung under a table, and moved through the timber being sawed, which remained stationary. There was no evidence that saws working in that manner were ever furnished with such guard or shield, although such saws were in common use. The count did not aver that the appellee did not know of the alleged defects. *Griffiths v. London, etc.*, Law Rep. 13, Q. B. 259.

The second instruction for the appellee was: "The jury are instructed that it was the duty of the defendant to furnish the plaintiff reasonably safe machinery to work with; and if the jury believe from the evidence that the defendant did not do so, but was guilty of negligence in that regard, as charged in the declaration, and that the plaintiff was in the exercise of ordinary care, and was, without negligence on his part, injured by negligence of the defendant as charged in the declaration, then the jury should find the defendant guilty."

The phrase "guilty of negligence in that regard, as charged in the declaration," is distributive, and if the appellants were guilty as charged in any one count they were guilty as charged in the declaration.

Under that instruction, and evidence on the part of the appellee as to the manner in which such a guard and shield might have been placed on the machine, the jury were warranted in finding, if they believed such evidence, for the appellee, on the counts upon which the appellee had no title to recover. At common law judgment would be arrested if there was a general verdict for the plaintiff upon a declaration of several counts, any of which were bad. *Gibbs v. Dewey*, 5 Cow. 503; *Holt v. Scholefield*, 6 D. & E. 691.

North Chicago Street Railroad Co. v. Louis.

This is changed by statute, Sec. 57, Practice Act. Snyder v. Gaither, 3 Scam. 91. The defendant may ask the court to instruct the jury to disregard the faulty counts. Sec. 50, Practice Act; Frink v. Schroyer, 18 Ill. 416. And only in that way can he raise the objection. Anderson v. Semple, 2 Gilm. 455. If, therefore, the plaintiff recover a verdict upon a declaration containing any good count, with evidence applicable to it, and correct instructions as to the hypothesis upon which he may recover, the verdict can not be disturbed because of a faulty count; but if the evidence be only such as sustains the faulty count, or if the instructions—either by reference to or recapitulation of the averments of such count—put the right to recover upon the basis, among others, of such faulty count being proved, then, unless the justice of the verdict upon the whole case be clear, there must be a new trial.

Where several counts, all good, are referred to by the instruction for the plaintiff, and there is a lack of evidence as to one or more, it is held in H. & St. J. R. R. Co. v. Martin, 111 Ill. 219, that it devolves upon the defendant to call the attention of the jury to the different allegations of the several counts, if he chooses so to do, and that case is applied and followed here, in L. S. & M. S. Ry. Co. v. Johnson, 35 Ill. App. 430.

Upon what ground the jury found for the appellee can not be known, but from the whole record it is as probable that the verdict is based upon the state of facts alleged in the counts upon which he has no right to recover, as otherwise, and therefore there must be a new trial.

The judgment is reversed and the cause remanded.

Reversed and remanded.

NORTH CHICAGO STREET RAILROAD COMPANY

v.

ANNA LOUIS.

Street Railroads—Negligence—Personal Injuries—Runaway Team—Evidence—Instructions—Remittitur.

35	477
138s	9
35	477
46	387
35	477
54	417
35	477
71	553

1. Persons under imminency of peril are not required to exercise all the presence of mind and care of one who is prudent and careful.

2. In such cases it is a question for the jury, whether or not the party acted rashly and under undue apprehension of danger.

3. In an action brought to recover from a street railway company for personal injuries arising from being struck by a runaway team belonging to such company, no excuse being offered by it for the escape of the same from the driver thereof, this court declines to interfere with the verdict for the plaintiff.

[Opinion filed March 10, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. W. B. KEEP, EDMUND FURTHMANN and H. H. MARTIN, for appellant.

Messrs. KRAUS, MAYER & STEIN, for appellee.

GARY, P. J. The undisputed facts of this case are, that about three o'clock in the afternoon of September 28, 1887, the appellee, a woman fifty years old, accompanied by a boy of five years of age, approached a Lincoln avenue car of the appellants, standing at the east side of the crossing of Cleveland avenue, to receive passengers going toward the center of the city, for the purpose of taking passage on the car. Lincoln avenue is a northwest and southeast street.

While she was approaching the car, a pair of horses with the whiffletree dangling at their heels, were running away and approaching the same car from the northwest having become detached from another car of the appellants which was following the first at a distance of a block or less. When the horses came to the first car they divided, one going on each side of it, and she was struck by one of the horses or the whiffletree, and badly injured.

The only dispute on the facts is as to her distance from the car when she was struck, but that dispute would seem to be closed by the fact, not disputed, that the injury to her came from the horses that struck the car which she was approach-

ing. She could only have been struck by them by being where they were, and they were at the car, which they shattered, to some extent; by the collision one of them was killed. The horses came to the car following the track, and she was not upon the track at all, and therefore she was struck after they divided.

No explanation or excuse was offered by the appellants of or for the escape of the horses from the car they were drawing, and from the control of their driver. Such a state of facts makes it of but little importance whether the instructions of the court were strictly accurate or not.

It was a case merely for the assessment of damages. There is testimony that people shouted to her to look out or get out of the way, but how near she was to the car at the first shouting is entirely uncertain, and there is nothing in the case to indicate that she was conscious that a runaway team was approaching, or had any intimation of what was the danger for which she was told to look out, from what direction it was coming, or in which direction she should flee for safety.

That in the confusion and her fright she sought the protecting shelter of the car toward which her thoughts as well as her steps were directed, can not be imputed to her as want of ordinary care for her own safety.

Before a fault in that regard can be charged upon her, it must appear that she had notice of what the peril was that she was to avoid. "Persons under imminency of peril may not be required to exercise all the presence of mind and care of a prudent, careful man; the law makes allowance, and leaves the circumstances to the jury to find if the party acted rashly and under an undue apprehension of the danger." *G. & C. M. R. R. v. Yarwood*, 17 Ill. 509.

This, it is true, was said of a passenger who had brought the injury he sued for upon himself, in his terror, but the principle is of general application. It was applied in *Coulter v. American M. U. Ex. Co.*, 56 N. Y. 585, where a woman sprang sideways to escape the danger from an express wagon, which was being driven rapidly behind her on the sidewalk, and in so doing hurt herself, the court saying: "The instinctive

effort on the part of the plaintiff to avoid the danger did not relieve the defendant from responsibility."

It appears from the report of the same case in 5 Lansing, 67, that she did not look around, and from the report in 56 N. Y., that the jury found there was no time to do so.

If an injury self-inflicted in avoidance of danger caused by another may be charged to that other, how much more should the party be excused for a failure in "exercising care and prudence for her own safety" under the pressure of that danger. 2 Thomp. Neg. 1092.

This doctrine of care on the part of the plaintiff is generally applied where the want of such care contributed to the injury complained of. Here nothing that the appellee did or failed to do contributed to her injury. That she was ever born at all gave the opportunity for the negligence of the appellants to injure her; and that she was in Lincoln avenue on that September afternoon brought the opportunity nearer. If there were no people on the streets the horses of the appellants might run away on them without hurting anybody; but the presence of people on the streets does not contribute to the hurt they may receive by the horses running away.

The best founded complaint of the appellants on this record is that the court refused to give an instruction that the plaintiff must prove, by a *preponderance of all the evidence*, that she was exercising ordinary care and prudence for her own safety. In the instructions which the court gave in lieu of all that the parties had asked, the jury were told that she must prove that she exercised ordinary care.

On the theory of the court as to the duty of the appellee, the instruction asked by the appellants should have been given, for it is by a preponderance of all the evidence introduced that the party holding the affirmative of an issue is to maintain it. And yet, put the whole doctrine of the decisions upon this subject together, an instruction much less impressive to the mind of average men than that given, as to the burden upon the appellee, would have been sufficient.

As to the sufficiency of an instruction, "the proper question

is, what was the idea designed to be conveyed, and how was it understood by the jury?" *Green v. Lewis*, 13 Ill. 642. And to maintain the affirmative it is sufficient if the evidence creates probabilities—that the weight of evidence inclines that way. *Crabtree v. Reed*, 50 Ill. 206. And therefore a jury may be instructed that a mere preponderance of evidence is enough. *Miller v. Balthasser*, 78 Ill. 302.

So, if in this case the jury had been instructed that the plaintiff must prove by a preponderance of all the evidence, but that it was not necessary that they should be satisfied (*Ruff v. Jarrett*, 94 Ill. 475), that a mere preponderance, creating probabilities—the weight of evidence inclined that way—would suffice, it would have been much less impressive than the instruction given. The jury rendered a verdict for the appellee, \$2,763.50.

The court required her to remit down to \$2,000, as a condition precedent to having a judgment on the verdict. This being done, judgment was entered. The appellants can make no point on this action of the court, since the remarks of the Supreme Court in *Albin v. Kinney*, 96 Ill. 214, and their decision in *Union R. M. Co. v. Gillen*, 100 Ill. 52.

On the whole record the judgment is right, and must be affirmed.

Judgment affirmed.

THE CHICAGO CITY RAILWAY COMPANY

v.

WILLIAM BLANCHARD.

Master and Servant—Street Railway Company—Recovery of Wages—Contract of Service—Conditions—Deposit—Forfeiture—Evidence—Instructions.

1. Contracts will not be so construed as to compel the proof of a negative unless that appears to be the express intention of the parties thereto.
2. In order to justify the retention of the deposit of an employe upon his discharge, the contract of service providing for such retention in certain cases, it must be shown that a contingency arose which warranted such action.

3. Clauses in contracts of service in the nature of forfeitures must be strictly construed.

4. Where the right to recover a deposit depends upon the exercise of the judgment of a given person, the forfeiture thereof under such clause will not be permitted unless it be shown that there was an exercise of such judgment in good faith, and in a reasonable, and not in an arbitrary or capricious manner.

5. In an action brought by a discharged employe of a street railroad company to recover the amount of a deposit made by him upon entering the employment of such company and certain wages alleged to be due, this court holds that the terms of the written contract under which the plaintiff was first employed was in no way changed or modified by a subsequent parol agreement to accept less wages if allowed to continue in such employment; that the contract first entered into controlled plaintiff's right of recovery upon his final discharge, and that in the absence of evidence warranting the retention of the sums in question, the judgment for the plaintiff must be affirmed.

[Opinion filed March 10, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

Appellee was a grip driver, and went into the employment of the appellant company under the following contract:

"This agreement witnesseth, that Wm. Blanchard, the party of the first part, having made application to the Chicago City Railroad Company, party of the second part, to be employed as *driver* upon its cars, and in consideration of such employment, having this day paid to the party of the second part the sum of fifty dollars, the receipt of which is hereby acknowledged, said party of the second part has agreed to employ him as such driver, and to continue him in its employment during its pleasure and no longer, and to pay him on its regular pay day for his services as such driver the compensation which it shall agree upon, the same being so much per day or so much per trip according to the time when the same shall be run, and to be fixed from time to time by notices posted in the offices of its different lines; but the party of the first part, whether paid by the day or the trip, shall not be entitled to pay except for the time he shall be actually engaged in running a car.

“The party of the first part promises and agrees well, honestly and faithfully to perform the duties of a driver for the said Chicago City Railway Company so long as he shall be continued in that employment, and to obey and fully comply with all rules and regulations now existing, as well as those which may from time to time be prescribed by the company for the drivers on its cars.

“The party of the first part further agrees that if, for any reason, he shall be suspended from the employment of said company, he shall not be entitled to any compensation during such suspension; and he further agrees that when his employment with said company ceases he will at once return to said company any badge or other property of said company in his possession, and that he will pay to said company during the time he shall retain possession of any such badge or other property of said company after he has been discharged or suspended from its employ, or his employment in any way shall cease, the sum of twenty-five (25) cents for each day that the same, or any of them, are so retained by him, not as a penalty but as liquidated damages; and he further agrees that any wages due him from the party of the second part, when his employment under this contract shall terminate, shall be retained by said party of the second part until all of said property is by him delivered to said company.

“And the said party of the first part further agrees to pay to said company any damage either to person or property, which the said company shall sustain directly or indirectly by reason of his carelessness, neglect, or misconduct during the time he shall remain in the employ of the said company, and any wages which may be due to the party of the first part at the time of such act or neglect, so causing such damage, shall be applied by the party of the second part, so far as shall be necessary in payment thereof, and said wages may be retained by said company until any claims for damages shall be determined or adjusted, and upon the termination of said employment, either by the resignation by said party of the first part of his said employment or upon his discharge by the party of the second part, if, in the judgment of the superin-

tendent of said company, said party of the first part during his employment as said driver, has not been guilty of any neglect, carelessness, dishonesty, misconduct, unfaithfulness, incompetency or dereliction of duty of any kind, on his part, in his said employment or duty of driver, and the company shall have suffered no loss or damage by reason of any act or neglect of said driver, and he shall have returned to the party of the second part all badges or other property intrusted by said company to him, then, and in such case, the said company agrees to pay to said party of the first part, on his written application therefor, and on his giving his receipt to the party of the second part, in full of all demands to such date, the sum of fifty dollars.

"In witness whereof, said party of the first part hath hereunto subscribed his name and the said Chicago City Railway Company have caused these presents to be subscribed by their superintendent, this twenty-second day of December, one thousand eight hundred and eighty-five.

"WILLIAM BLANCHARD. [SEAL]

"C. B. HOLMES, Supt. [SEAL]

"Signed and delivered in the presence of :

"H. H. WINSOR, Secretary."

The action was brought to recover the \$50 deposited, and some wages which were due him. The judgment in his favor was for \$99.44. Other facts sufficiently appear in the opinion.

Mr. C. M. HARDY, for appellant.

Messrs. WINTERS & COY, for appellee.

MORAN, J. It appeared on the trial that after appellee had been at work as driver for some months, under the contract set out in the statement of facts, he was discharged on the ground that a man named Humble had been injured through his carelessness. Appellee denied that he was in any manner careless, or in any way to blame for the alleged accident, and sought to be reinstated in the employ of the company. An

arrangement was made between him and the superintendent of the company by which he was taken back into the service of the company, \$10 per month of his wages to go toward the payment of the sum of \$175, which it was claimed the company had paid to Humble for his injuries. He went to work and continued for something over four months, when he was again discharged. From the pay for each of three of said months, the \$10 was deducted with his consent, and on the trial the court allowed to the company \$10 deduction from the wages of the fourth month. After his last discharge he went to the superintendent, and was told by him that the company could not use him any more, that in some ways he was a good man, but he thought him a little too careless. Appellee said: "Very well, can I settle with the company to-day?" and the superintendent said: "Yes, you can; you go to the secretary and he will settle with you." Appellee thereupon went to the secretary and gave up his badge as requested, and signed a paper presented to him for signature, which appears to have been a formal resignation of his employment with the company, and was then told by the secretary to "go to Mr. Pennington for his pay." He went to Pennington and was told he would have to get an order before he could draw his pay, and then went back to the secretary, who said: "I do not see that we owe you anything."

On the trial the counsel for appellant contended and requested the court to hold as law, that the terms of the written contract of December 22, 1885, under which appellee was first employed, and which is set out in the statement of facts, was in no way changed or modified by the parol arrangement between appellee and the company, made when he was taken back after his first discharge, and further requested the court to hold that said parol agreement was without consideration, and was void under the statute of frauds, because it was not to be performed within one year from the making thereof, and that either party could reject it, and act as though it had never been made. The court formally refused to hold the written propositions embodying these contentions, but seems to have acted upon the principle contended for, and held the parol

agreement valid only so far as it had been performed, allowing the company to retain \$10 per month from the wages of appellee for the three months he worked under that understanding, treating it as in effect an agreement, on appellee's part, to work for \$10 a month less than the regular wages in order to retain his employment.

We think this conclusion correct. Appellee's testimony is clear and is uncontradicted, that he did not admit that he owed anything to the company when he made the parol agreement, but that he was willing to submit to the deduction of \$10 per month from his wages until the deductions should amount to \$175, in order to retain his employment. We therefore agree with the contention of appellant that the rights of the company and the rights of appellee are to be determined by the written contract of December 22, 1885, that said contract was in no way modified or affected by what was done by parol, and that it controlled appellee's rights as to the deposit and as to his wages at the time of his final discharge.

There is some contention that the \$50 deposited became the property of a third person who advanced the money for appellee, but the position is wholly without support. There was no assignment of appellee's rights under the contract, and the third person merely became the creditor of the appellee, and could not maintain the action for the deposit against the company. We come, therefore, to consider the rights of the parties under the written contract. The clause of the contract which gives the company the right to retain the wages of the appellee for damages, provides that he shall pay any damage which the company may sustain "by reason of his carelessness, neglect or misconduct during the time he shall remain in the employ of the company, and any wages which may be due to the party of the first part, at the time of such act or neglect so causing such damage, shall be applied * * * in payment thereof, and said wages may be retained by said company until any claims for damages shall be determined or adjusted."

Now, so far as regards the amount of wages due to appellee

it is very clear that there was no circumstance in evidence in this case which would authorize its retention by the company under the terms of that clause. There is no proof whatever that the company had sustained any damages by reason of the carelessness, neglect or misconduct of appellee or that there was any claim pending against the company and undetermined for damages so arising. In order to retain the wages under that clause, the company must prove, when suit is brought for the wages, the very facts required by the agreement, *i. e.*, that it has sustained damages by the neglect or misconduct of appellee. As we have stated, there can be no pretense that such proof was made in this case. The right to recover the \$50 deposit is to be next considered.

The clause of the contract relating thereto, provides that on the termination of the employment, if, in the judgment of the superintendent of the said company said party of the first part during his employment as said driver, has not been guilty of any neglect, carelessness, dishonesty, misconduct, unfaithfulness, incompetency or dereliction of duty of any kind on his part in his said employment or duty of driver, and the company shall have suffered no loss or damage by reason of any act or neglect of said driver and he shall have returned to the party of the second part all badges, * * * the said company agrees to pay to said party of the first part * * * the sum of \$50." This clause aims to put it in the power of the superintendent to forfeit the deposit of \$50 on the exercise of his judgment, and the rule is well settled, that such terms in contracts are to receive a rigidly strict construction. Before the forfeiture will be permitted under such clause, it should be shown that there was an exercise of the judgment on which the right to recover is made to depend, and that it was exercised in good faith and in a reasonable and not in an arbitrary or capricious manner. Leake on Contracts, 637; Slingerly v. Thayer, 108 Penn. St. 291.

The superintendent was invited to exercise this judgment when he was asked by appellee at the time of his final discharge, if he could then settle with the company. If what he then said can be regarded as an exercise of his judgment on

the question at all, it must have been held to have been exercised in favor of appellee, for he directed him to go to the secretary. He could not leave the matter of the forfeiture to the judgment of the secretary. The power could not be delegated. It must be exercised by the one on whose judgment the parties reposed. Therefore the direction to go to the secretary to settle was, fairly construed, a determination that there was to be no forfeiture. But if it be admitted that what occurred is to be construed as a judgment of the superintendent against appellee on the matter left to his determination, yet that does not, in our opinion, furnish a defense to appellant. Before the \$50 deposited by appellee could be rightfully retained by appellant, two things must be made to appear: first, it must be the judgment of the superintendent that appellee had been guilty of the neglect or other dereliction of duty mentioned, and second, it must be shown as a matter of fact, that the company had suffered loss or damage by reason of the act or neglect of appellee. It may be said with reference to this last proposition, that the burden was on appellee, because of the form of the clause in the contract, to prove that the company had suffered no loss. We think not. Contracts will not be so construed as to compel the proof of a negative, unless that appears to be the express intention of the parties. It was for the company to prove loss suffered by reason of appellee's neglect, and it made no proper attempt to do so. It necessarily follows that appellee, having demanded his money, was entitled to receive it, unless the appellant proved the existence of facts which, under the terms of the contract, would entitle it to retain it. Having wholly failed to prove such facts, the judgment for the deposit as well as for the balance of wages, was correct, and must be affirmed. The formal error of the court in refusing some of appellant's propositions of law did not affect the result.

Judgment affirmed.

Hursen v. Lehman.

PATRICK HURSEN

v.

EDWIN LEHMAN.

Practice—Bill of Exceptions—Failure to Incorporate Papers and Instructions Therein.

1. A paper attached to a bill of exceptions after the signature of the trial judge should not be considered.
2. Nor instructions so appended instead of being copied therein.

[Opinion filed March 10, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. ARBA N. WATERMAN, Judge, presiding.

Mr. JOHN N. JEMISON, for appellant.

Mr. GEORGE W. PLUMMER, for appellee.

GARNETT, J. This case has been tried by two different juries. Each of them rendered a verdict for appellee. Appellant now says the last verdict is contrary to the evidence. We are not prepared to concur in that view, but certainly no such preponderance of evidence in favor of appellant is shown by the bill of exceptions as to warrant interference by this court.

Admission in evidence of the contract sued on is also assigned as error because erasures appeared upon its face. The bill of exceptions does not set out any copy of the contract or state it was read to the jury. It only states that plaintiff's attorney said, "We will now offer it in evidence." Defendant's attorney having said that it might go in subject to objection, there then appears this direction to the clerk: "(Here insert);" but it was not inserted. After the signature of the judge, there is attached to the bill of exceptions a paper which is probably a copy of the contract, but it is no

part of the bill of exceptions and can not be recognized. C., M. & St. P. Ry. Co. v. Harper, 128 Ill. 384.

If, however, the contract was read to the jury, the erasures therein were previously explained by the testimony of appellee and it was properly admitted. The instructions, like the copy of the contract, were appended to the bill of exceptions instead of being copied therein, and so do not require any comment.

The judgment is affirmed.

Judgment affirmed.

35	490
160	48
35	490
64	166
35	490
90	389

CHICAGO CITY RAILWAY COMPANY

v.

CATHERINE ENGEL.

Street Railways—Negligence—Personal Injuries—Collision with Locomotive—Crossings—Evidence—Instructions.

1. Carriers of passengers are required to exercise the highest degree of practicable care and diligence under the circumstances of a given case, to protect their passengers from injury.

2. Where it is shown that a passenger in a street car was injured by reason of an accident, the burden is upon the carrier to account for the same.

3. In an action brought to recover from a street railroad company for personal injuries alleged to have been occasioned by its negligence, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff.

[Opinion filed March 10, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. C. M. HARDY, for appellant.

Messrs. ARMSTRONG, REED & DYCKE, for appellee.

GARY, P. J. The appellee was a passenger in a car of the appellants which collided with a locomotive of the Chicago & Alton R. R. Co. at the intersection of Halsted street and the track of the latter company. She was injured in that collision, and brings this action to recover damages therefor.

Whether the servants of the appellants were negligent in going upon the crossing while the gates were being lowered, or whether the servants of the Chicago & Alton were negligent, or something worse, in lowering the gates after the car was upon the crossing, and thereby preventing escape from the crossing, were questions for the jury.

All of the instructions asked by appellants as to the measure of their duty assume, or in terms state, that they were required to use only ordinary care for the safety of their passengers. This was, no doubt, an oversight. The law is, and must be familiar to the counsel who tried the case, that carriers of passengers are required to exercise the highest degree of practicable care and diligence under the circumstances. The court instructed that if the collision was the result of the negligence of both companies, or of the appellants only, the appellants were responsible; if of the Chicago & Alton only, then appellants were not responsible; * * * that the burden of proof was upon the plaintiff, and she must establish her case by a preponderance of the evidence; which was much too favorable for the appellants.

That she was a passenger on their car, and that the collision happened, was not disputed. It was for the appellants to explain or account for the accident. G. & C. U. R. R. Co. v. Yarwood, 15 Ill. 468.

Complaint is made that the court used the words "shut car" in an instruction.

The accident occurred December 5th. The appellee testified to being in the car, and of the windows in it. It can not be harmful that the court assumed that the car was not an open one. There is no error in the record and the judgment is affirmed.

Judgment affirmed.

THE PLUME & ATWOOD MANUFACTURING COMPANY
ET AL.

V.

FRANK C. CALDWELL, ASSIGNEE, ET AL.

Insolvency—Judgment by Confession—Assignment—Attachments—Priority—County Court—Jurisdiction of.

1. A creditor, holding the judgment note of his debtor, may avail himself of the benefit thereof, when he sees fit. He may delay until the danger of loss is impending, without sacrificing any advantage.

2. Consent by creditors suing separate attachments out of the Circuit Court, that property attached be turned over to the assignee of the common creditor, subsequently appointed by the County Court, gives the latter court exclusive jurisdiction in the adjustment of claims against the property.

3. In a controversy involving the priority of certain levies upon property of a common debtor, this court declines to interfere with the decree of the trial court giving the bank in question priority over certain creditors, and placing the latter upon the level with other unpreferred creditors.

[Opinion filed March 24, 1890.]

APPEAL from the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

Mr. C. M. HARDY, for appellants.

Messrs. KRAUS, MAYER & STEIN, for appellees.

Messrs. FLOWER, SMITH & MUSGRAVE, for Commercial National Bank.

GARNETT, J. This appeal brings here for review a decree of the County Court in the matter of George Bohner & Co., an insolvent corporation. On January 26, 1889, a judgment by confession was rendered by the Superior Court of Cook County in favor of the Commercial National Bank of Chicago

against George Bohner & Co., for the sum of \$5,635.38, upon which an execution was issued and delivered to the sheriff of Cook county at 5:45 P. M. of the same day. Early in the morning of January 28, 1889, the appellants and three other creditors sued out of the Circuit Court of Cook County separate writs of attachment against the same debtor, and placed them in the hands of the sheriff. The execution and writs of attachment were all levied about 7 o'clock A. M. of January 28th, on all the tangible property of the debtor, and a custodian placed in charge thereof. In less than one hour thereafter Bohner & Co. executed and delivered to appellee a deed of assignment for the benefit of creditors, which was at once filed in the office of the clerk of the County Court, and about 8:35 A. M. in the recorder's office of Cook county. The assignee, finding the insolvent's place of business and property in the possession of the sheriff, filed a petition the same day in the County Court, praying for an order on the sheriff to deliver the property to the assignee, subject to all the rights, "priorities and liens which may have been acquired by virtue of" the several writs. The same day the court entered an order, by consent of all the parties, directing the delivery to the assignee subject to all such rights, priorities and liens. The debtors then filed a petition, in which the assignee joined, praying for an adjudication upon the priorities of the bank and the attachment creditors. Another petition was filed by other creditors, attacking the priority claimed by the bank. Issues having been joined on these petitions, the question of priority was set for hearing in the County Court for April 2d, and on April 17th a decree was entered finding that the bank was entitled to the preference obtained by its execution and levy, but denying appellants any greater rights than other unpreferred creditors.

When the hearing of evidence was about to begin in the County Court, appellants objected to proceeding for want of jurisdiction, but the objection was overruled; appellants excepted, and the ruling is assigned as error. Appellants insist the Circuit Court should have been permitted to determine the question of priority as to them. That right they

parted with when they consented to the surrender of the property to the assignee. The surrender was not compulsory, but voluntary. Thereafter the process of the Circuit Court could not reach the property or its proceeds. The personal liability of the insolvent to appellants may still be settled in the attachment suits, but the power of complete control and disposition of the property and distribution of its proceeds was transferred to the County Court when delivery was made by the sheriff to the assignee by appellants' consent. They are not thereby deprived of any valuable right, as the County Court may order a trial by jury when that is the proper method of settling conflicting rights. *Hanchett v. Waterbury*, 115 Ill. 220. But a division between two courts of the duties pertaining to the administration of property, in the possession of an assignee of an insolvent estate, must result in embarrassing the procedure to such an extent as to largely impair the value of the estate. The jurisdiction of the County Court does not attach to property detained by adverse execution or attachment, without the consent of the party for whom possession is held; but, consent once given, the County Court excludes all other jurisdictions in the adjustment of claims against the property. Consent and delivery bring the property within the terms of the deed, and it thereby becomes, to all intents and purposes, a part of the assigned estate. *Hanford Oil Co. v. First National Bank*, 126 Ill. 584, is authority on this point.

Appellants also complain of the decree because it denies them priority under their attachments. At the hearing they entirely failed to make out any case. They introduced evidence, but none of it tended to prove that either of them had a valid debt due when the attachments were issued. No proof whatever was given of any cause for attachment. The affidavits for attachment filed in the Circuit Court were offered and received in evidence. They were competent for the purpose of proving the fact that they were made and filed, but they did not tend to prove any fact stated in them. Whether, therefore, appellants, by their attachment suits, took unlawful preferences within the prohibition of the statute, we need

not inquire, as they showed no foundation whatever for the attachment proceedings. Error is also assigned upon the part of the decree awarding a preference to the bank. The judgment notes held by the bank were taken by it long prior to January 26, 1889, in the regular course of business, for loans made to George Bohner & Co. The finding in the decree is that preference of the bank was the result of its own superior diligence; but the appellants say that the action of the bank was inspired by information given to Eames, its president, by Bohner, president of the insolvent, to the effect that George Bohner & Co. were about to make an assignment, and that the making of the deed to appellee was delayed for the purpose of permitting the bank to perfect an execution lien. There is no direct evidence to support this charge. Eames and Bohner were old acquaintances, and the insolvent had been, during the whole of its corporate existence, a regular depositor and customer of the Commercial National Bank. Eames made frequent inquiries of Bohner as to the business of his company, and about January 20, 1889, having learned from him that the company had lost money, he asked Bohner to bring him a list of the liabilities. The list was accordingly handed to Eames on January 26th. Bohner admitted to Eames that the company was unable to pay all its debts, and said he did not know what to do. He informed Eames that the agents of some of the other creditors had advised him to make an assignment. Eames advised him not to make an assignment, but to try to get a compromise with his creditors. He said nothing to Eames of any intention to assign, nor about securing or preferring the bank, nor did he suggest or advise action by the bank. The evidence tends to prove that the assignment was not determined upon until after the bank execution was in the hands of the sheriff, and neither Eames nor the bank had notice of the intention to assign until after the execution lien was fixed. When Eames discovered the situation of the insolvent he sent for his attorney, and, after conference with him, placed in his hands the judgment notes, with instructions to proceed to judgment and execution at once. The order was obeyed, and upon these facts it can not

be said that the court erred in deciding that the bank preference came by means of the vigilance of its president, and not as a voluntary offering of the insolvent as a part of a scheme to yield the dominion of all its property for the benefit of creditors.

The testimony of appellants' witnesses, Fairbien and McRoberts, to the effect that Bohner had promised them to make an assignment before the judgment of the bank was entered, has not been overlooked. The promise is denied by Bohner, but, assuming that he made the promise, yet the preference of the bank is not unlawful if it was the result of its own inquiry and swift movement after Eames discovered the serious condition of the debtor's affairs. The entry of judgment two days before the delivery of the deed of assignment, Sunday only intervening, and the danger of insolvency, which was then plain, are not conclusive evidence that the preference was unlawful. The creditor holding a judgment note has the right to determine when he will avail himself of the benefit thereof, and may delay until the danger of loss is impending without sacrificing any advantage. He has "a right to take every precaution to save or secure his debt, and the fact that he delays until the debtor may be on the eve of bankruptcy is no argument against the good faith of his acts." *Field v. Geohegan*, 125 Ill. 68.

The decree is affirmed.

Decree affirmed.

35 496
44 319

THE CHICAGO DRIVING PARK ET AL.

V.

PORTER S. WEST.

Appeals—Bond—Action on—Practice—Pleading—Trial by Jury—Waiver of Right to—Erroneous Judgment—Correction—Gambling Transaction.

1. Where a party desires a trial by jury, and objects to a trial by the court, it is erroneous to refuse his request; but if present by counsel, who fails to object, the right to a jury is waived.

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2. It is proper to refuse leave to file a plea, bad in substance.
3. An adverse judgment can not be collaterally attacked in an action at law, on the ground that the action in which the judgment was rendered was based upon a gambling transaction.

[Opinion filed March 24, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. S. K. Dow, for appellant.

Whenever a cause is remanded, not less than ten days notice must be given to the adverse party, or his attorney, before the cause can be reinstated in the court from which it was removed. Practice Act, R. S., Ch. 110, Sec. 84; *Miller v. Glass*, 14 Ill. App. 177.

Even if cause had been properly reinstated in the Superior Court, the motion for judgment ought not to have been entertained in vacation. No attempt was made to bring this case—and it could not be brought—within the general order and rules entered of record in said court on July 12, 1889. The court had a right to adopt such rules, but, having done so, must follow them. Rev. Stat., Ch. 37, Sec. 57; *Beveridge v. Hewitt*, 8 Ill. App. 467; *I. C. R. R. Co. v. Haskins*, 115 Ill. 300.

This suit was founded upon a gambling transaction, and any bond given must be tainted with the vice of gaming, and therefore void. Rev. Stat., Ch. 38, Sec. 131; *Tatman v. Strader*, 23 Ill. 493; *Parmelee v. Rogers*, 26 Ill. 56; *Mallett v. Butcher*, 41 Ill. 382; *Mosher v. Griffin*, 51 Ill. 184.

The defense of gaming could be made in this suit, notwithstanding the opinion of this court, holding that defense available only in equity, and reversing and remanding the case with instructions to enter judgment for plaintiff. *West v. Carter*, 21 N. E. Rep. 782; *Gage v. Board of Directors*, 106 Ill. 508.

This defense of gaming is a *privileged defense*, and can be made at *any* stage of proceedings, even after judgment. Rev. Stat., Chap. 38, Sec. 135.

The Chicago Driving Park was therefore entitled to file its special plea and to have a trial upon the issue tendered by that plea. *West v. Carter, supra.*

The Chicago Driving Park was not in default, and had not waived its right of trial by jury. It was therefore entitled to have this issue on its special plea tried by a jury. Rev. Stat., Ch. 110, Sec. 39; Const., Art. II, Sec. 5.

Even if this case had been duly reinstated in the Superior Court, and the filing of the special plea permitted, the court had no right to take the case out of its order and try it *instantly*, but it should have waited its turn till reached in the regular call of cases for trial, unless good and sufficient cause were shown. Rev. Stat., Ch. 110, Sec. 17; *Nelson v. Akeson*, 1 Ill. App. 165; *Booth v. Storrs*, 54 Ill. 472; *Fisher v. Nat. Bank of Commerce*, 73 Ill. 34; *Griswold v. Shaw*, 79 Ill. 449.

Messrs. JONES & Lusk, for appellee.

MORAN, J. This case was here before, under the title of *West v. Carter*, on appeal from a judgment adverse to the present appellee, in a suit on the bond which constitutes the cause of action. The judgment of the Superior Court was reversed on the appeal, and the case is reported in 25 Ill. App. 245. The judgment of this court remanded the case, with directions to the Superior Court to enter judgment for the plaintiff, the appellee here, for the penalty of the bond sued on, in debt and damages for the amount of the judgment entered thereon, etc.

Such direction was given inadvertently by this court. The case being at law, no directions should have been given, and if the appellee in that appeal had called the attention of this court to such improper part of the judgment, during the term at which it was entered, it would have been our duty to have corrected the judgment in that respect, and to have modified the opinion.

The case was, after being remanded, redocketed in the Superior Court, and a notice given by the appellee of a motion that judgment be entered in accordance with the directions

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of this court. On the day set to hear the motion, the Superior Court took up the case, and, as it appears from the record, a trial was in fact had before the court. The appeal bond sued on was regularly introduced in evidence; also the transcript of the justice, showing the amount of the judgment rendered before him, and a witness was sworn and testified to the amount of interest accrued, and from this evidence the court found the amount of the debt and damages and entered the proper judgment.

Though the parties may have supposed that the direction of this court was being followed, what in fact was done was to proceed with a trial before the court without a jury, and appellant's bill of exceptions shows every step taken which is ordinarily taken on such a trial, and has preserved the evidence introduced, with all the objections entered. If appellant desired a trial by jury and had objected to the trial by the court, it would have been error to have denied him a jury; but as he was present by his counsel, and failed to interpose any objection of that kind, he waived his right to have the case submitted to a jury. *Phillips v. Hood*, 85 Ill. 450. The refusal of the court to allow the appellant to file the plea offered is assigned as error. The plea was bad, in substance, and the court was therefore right in denying leave to file it. We adhere to the opinion in *West v. Carter*, *supra*, that an adverse judgment can not be collaterally attacked in an action at law, on the ground that the action in which the judgment was rendered was based upon a gambling transaction. We do not agree with counsel that the Supreme Court have announced a different doctrine in *West v. Carter*, 129 Ill. 249. That case simply holds the doctrine, before announced, that such a judgment may be set aside in equity.

There is nothing in counsel's contention that the court could not take the case up in vacation. It is not shown that there was any order adjourning the term. And by the law a term commences on the first Monday of each month. There is no error shown in this record which is available to appellant to reverse the judgment, and the same must therefore be affirmed.

Judgment affirmed.

W. O. TYLER PAPER COMPANY

V.

THE ORCUTT-KILLICK LITHOGRAPHING COMPANY
ET AL.

Fraud—Mortgage—Failure to Record—Subsequent Indebtedness—Foreclosure.

1. The mere neglect to record a real estate mortgage during the period that the mortgagor is incurring other debts, and the fact of giving judgment notes to certain creditors unknown to others, is not fraudulent, in so far as to justify allowing unsecured creditors to follow the proceeds of property upon which the liens of the other creditors were originally based.

2. Upon the contention by a creditor of a defunct corporation upon a debt contracted by it, while a certain mortgage upon its property to a person who had previously loaned it money was unrecorded, that it was entitled, having a judgment and unsatisfied execution, to follow the proceeds of the property into the hands of the mortgagee, he having taken possession under the mortgage, this court holds that the acts of the mortgagee, being neither fraudulent in fact or by construction of law, the decree dismissing the complainant's bill was proper.

[Opinion filed March 24, 1890.]

IN ERROR to the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

MESSRS. TENNEY, HAWLEY & COFFEEN, for plaintiff in error.

MESSRS. OSBORNE BROS. & BURGETT, for defendants in error.

GARY, P. J. The preponderance of the evidence in this case fairly shows that on the 19th of October, 1886, the Lithographing Company, one of the defendants in error, owed the other, Henry Hartt, about \$1,800. That on Sunday next before that date Hartt and the managers of the company met, and they told him that the business was running pretty well, but they needed money; and he told them to give him a mortgage and he would give them money; that he would keep

it off from the record until they could not get along any more, and then they should come and tell him, and he would foreclose, so that they should not get into trouble.

The testimony as to this conversation was by a witness who was not speaking his native language, and who confessed his unfriendliness to Hartt, and it was not argued by the appellants, and indeed could not fairly be argued, that the witness meant, or that the parties intended, that the mortgage should be kept from the record as part of a scheme fraudulent in fact, devised to enable the company to obtain goods with the intention to not pay for them, and defraud creditors. The witness was himself one of the managers of the company, and in his testimony now insists that the company might have prospered but for the dissipation of another of the managers. It is the fair construction of his testimony that what the parties intended was simply that Hartt should have security without injuring the credit of the company, and that the company would in good faith endeavor to make a success of the business.

The mortgage was given, acknowledged the 8th day of November, 1886, and recorded the 29th of April, 1887. Before it was recorded, creditors, not parties to this litigation, had entered judgment against the company, but levied after it was recorded. Then Hartt took possession under this mortgage, and also took an absolute bill of sale; bought the judgment, and organized a new corporation to conduct the lithographing business.

It is proved that the appellants applied to a mercantile agency for information as to the financial standing of the lithographing company while this mortgage thus remained concealed; that the mercantile agency applied to the dissipated manager, who made a statement grossly false, and that the appellants extended the credit which is the basis of their claim upon their belief of the truth of that statement. But of that whole transaction Hartt was entirely ignorant. He had no notice that any one connected with the company made, or would, or intended to make, any statement of its condition.

The appellant obtained no lien upon the property of the

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lithographing company while it remained theirs, but claim that, having a judgment and unsatisfied execution against the company, upon a debt created while the mortgage lay concealed, they are entitled to follow the proceeds of the property into the hands of Hartt on the ground of fraud.

The mere neglect to record real estate mortgages during a period that the mortgagor is incurring other debts, and giving also judgment notes of which such new creditors have no notice, it is held, is no fraud, enabling such new creditors to follow the proceeds of the personal property of the debtors, sold under judgment and execution upon the notes, into the hands of the creditors who thus held undisclosed security. *Field v. Ridgely*, 116 Ill. 424.

A similar case as to judgment notes is *Hegele v. Nat. Bk.*, 129 Ill. 157. In *Read v. Wilson*, 22 Ill. 377, it was decided that a chattel mortgage on a stock of goods kept for sale in a retail trade, and providing that the mortgagor might retain possession unless the mortgagee should deem the property in danger, etc., and which was therefore void as against creditors, under the decision in *Davis v. Ransom*, 18 Ill. 396, was yet valid against the levy of an execution, the mortgagee having taken possession before the levy. It did not appear, and probably was not the fact, in that case, that the debt to be collected under the execution, accrued after the execution of the mortgage. In cases on the law side of the court it has been many times held that possession taken under a chattel mortgage, invalid from non-compliance with statutory details, secures priority over other claims upon the property, not liens upon it when possession was so taken. *Chipron v. Feikert*, 68 Ill. 284; *Frank v. Miner*, 50 Ill. 444; and the same rule was applied in equity in *Gaar v. Hurd*, 92 Ill. 315.

But in none of the cases was the feature of intervening credit, if it existed, made a subject of discussion. An arrangement in writing, probably secret (though the case does not show it), when the new credit was given, by which the vendee has possession of stock of goods for sale at retail, the title to remain in the vendor until he is paid, with the right in him to take possession of the stock, and all additions to it,

upon default in payment, is not fraudulent in fact on the part of the vendee, so as to be the ground for an attachment against him. *Shove v. Farwell*, 9 Ill. App. 256. Here the only claim of the appellants must be that the conduct of Hartt was such as in fact was fraudulent, or that by construction of law, it becomes such.

It is *non sequitur* to hold that to do that which, without agreement, is to be regarded, if the Supreme Court made no mistake in *Field v. Ridgely*, 116 Ill. 432, as "the forbearance of a creditor to crush out a struggling debtor upon the first opportunity, with a view of enabling him to overcome business misfortunes," "so long as the creditor's conduct is characterized by good faith," and "such forbearance should be regarded by the courts with favor," does, by the promise of the creditor so to do, become reprehensible as fraud.

The bill was rightly dismissed, and the decree is affirmed.

Decree affirmed.

GARNETT, J. One of the witnesses for the appellants testified that before the mortgage was given to Hartt he promised the president and secretary of the Orcutt-Killick Lithographing Company, that if a mortgage was given him to secure his debt he would not place it on record until the company could not get along any more, and then they should tell him and he would foreclose.

Hartt testified on this point, simply, that he made no such agreement. He does not deny that the conversation occurred as sworn to by appellants' witness. He merely swears to a legal conclusion, and such testimony does not tend to prove any fact out of which the agreement arises. *Barrett v. Hinckley*, 124 Ill. 34.

So that the evidence of Hartt's promise stands uncontradicted. The chattel mortgage covered, substantially, all the assets of the company, and provided that the possession thereof should remain with the mortgagor until default in payment. Hartt kept his promise until after the debt to complainant was contracted, and the property, during all that time, was in possession of the mortgagor.

Now, the question is, whether a creditor who, by means of the promise shown by the evidence, brings into existence the chattel mortgage which puts the fortunes of the debtor within his control, may, by recording the instrument, avail himself of the advantage against others who have, subsequently, sold goods to the debtor on the faith of his apparently absolute ownership of the property. That the party who conceals his lien under such circumstances must suffer rather than the innocent creditor who, in the usual course of business, trusted to appearances, is satisfactorily shown in *Hilliard v. Cagle*, 46 Miss. 309; *Gill v. Griffith*, 2 Md. Ch. 270; *Standard Paper Co. v. Guenther*, 67 Wis. 101; *Sanger v. Freie Presse Co.*, 41 N. W. Rep. (Wis.) 436; *Walton v. First Nat. Bk.*, 2 Pac. Rep. (Col.) 440. See also, *Hildeburn v. Brown*, 17 B. Mon. 779; *Bump on Fraudulent Conveyances* (3d Ed.), 39; *Wait on Fraudulent Conveyances*, Sec. 235.

This is but the application of the well-settled principle that a man is responsible not only for the direct effect of his acts, but likewise for all the consequences which may naturally and reasonably be expected to flow from them. The company being actively engaged in business, Hartt must have known that, in the usual course of its business affairs, others would extend to it credit on the strength of its ownership of property in its possession, against which the record disclosed no lien.

The case differs from that where the promise to withhold from record is made by the mortgagee after the delivery of the mortgage. Yet, even in such a case, if the promise is kept and subsequent unsecured debts are contracted by the mortgagor to the parties having no notice of the secret lien, I am not prepared to say that the recording of the mortgage afterward will operate to postpone such subsequent creditors.

Here the property is not sufficient to satisfy appellant and Hartt both, and, in my opinion, Hartt should be the loser.

Rawson v. Rawson.

MECKIE L. RAWSON
v.
STEPHEN W. RAWSON.

35	505
72	178
85	505
108	*802

*Criminal Law—Contempt—Presence of Court—Commitment—Order for
—Requisites of—Jurisdiction.*

1. A contempt is a criminal offense, and a sentence of imprisonment for a contempt is a judgment in a criminal case.
2. Such an offense not being punishable in the penitentiary, is a misdemeanor.
3. Proceedings of this character should be in the name of the people.
4. Where an order for commitment for contempt constitutes the entire record, it is the duty of the court making the same, to set out fully therein in what the contempt consisted, in order that an appellate court may see whether the judgment was warranted.
5. The order for commitment of a person guilty of contempt in the presence of the court, should show that the defendant was in court when judgment was entered.
6. This court has authority to review judgments of courts of record in contempt cases.

[Opinion filed March 24, 1890.]

IN ERROR to the Superior Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Messrs. W. P. BLACK and SETH F. CREWS, for plaintiff in error.

Messrs. GOUDY & GREEN and H. C. WHITNEY, for defendant in error.

MORAN, J. The entire record (except the *placita*) in this case is as follows:

“MECKIE L. RAWSON }
v. } Bill.
STEPHEN W. RAWSON. }

The complainant having committed a contempt of this court in the presence of this court,

It is ordered that said complainant, Meckie L. Rawson, be, and she is hereby adjudged to be in contempt of this court, and that she, the said Meckie L. Rawson, stand committed to the common jail of Cook county for the term of sixty days from this date.

And afterward, to wit, on the 9th day of July, A. D. 1888, the same being one of the days of the July term of said court, the following, among other proceedings, were had in said court and entered of record, to wit:

MECKIE L. RAWSON	}	Bill.
STEPHEN W. RAWSON.		

This day cometh complainant, and moves to vacate the order entered herein June 1, 1888, confining the said complainant in the county jail for contempt of court. After argument of counsel said motion is denied."

The order of commitment reciting that the contempt was in the presence of the court, the first question is as to the authority of this court to review the judgment. In *Clark v. The People, Breese, 340*, it was held that the Circuit Court had no jurisdiction to review the judgment of a magistrate for a contempt committed in his presence. From the opinion in the case it may be inferred that a judgment for contempt is subject to review, but the only point decided is that the statute gave no appeal from the judgment of the justice imposing a fine for contempt, and that the Circuit Court properly dismissed the appeal. The case is not, therefore, an authority that a judgment in a proceeding for contempt is not reviewable.

In *Stuart v. The People, 3 Scam. 395*, the Supreme Court took jurisdiction to review a judgment of the Circuit Court in a contempt proceeding on a writ of error, on the ground that that court had power under the statute to review the final judgment of any inferior court of record in the State, where the judgment decides the right of property or of personal liberty. A contempt is a criminal offense, and a sentence of imprisonment for a contempt is a judgment in a criminal case. Such an offense not being punishable in the

Rawson v. Rawson.

penitentiary, is a misdemeanor, and this court has, by statute, jurisdiction of all writs of error from final judgments in this district in misdemeanors. *McDonald v. The People*, 25 Ill. App. 350; *Beattie v. The People*, this court, October term, 1889.

It was the constant practice of the Supreme Court to review on error the judgments of the Circuit Court and of the Criminal Court of Cook County in contempt matters before the establishment of the Appellate Court, and it has been the practice of this court to review such judgments whenever the record of such a case has been presented and error assigned. It is, then, the established law of this State that judgments of courts of record in contempt are subject to review. It is true that none of the reported cases appear to have been contempts committed in the presence of the court, but if contempts are subject to review at all, no valid reason can, as we believe, be suggested why contempts committed in the presence of the court should be distinguished from others in that regard, and judgments of fine or imprisonment therein exempted from the revisory jurisdiction of an appellate tribunal. A court is just as liable to err against the accused in a proceeding to punish him for a direct contempt, as for a constructive one; and, as the Supreme Court said in *Stuart v. The People*, *supra*, "Perilous, indeed, would be the condition of the citizen, if he had not the privilege in such a case to have it reviewed by another tribunal, and defective would be our jurisprudence if it afforded no means of relief."

Coming, then, to consider the record presented to us in the case, we have first to notice an irregularity in the entitling of the judgment. The proceeding, as we have before said, is a criminal prosecution, and as such is required by the constitution to be carried on in the name and by the authority of the People of the State of Illinois. Art. 6, Sec. 33.

The case in which the order of imprisonment is entered is in chancery, the proceeding by bill. If the act was a civil, as distinguished from a criminal contempt, that is, if the power of the court was being exercised to compel obedience to some order made for the benefit of a party to the suit, as an injunc-

tion or the like, then perhaps the order might be entitled in the suit between the parties. *People v. Craft*, 7 Paige, 325; *Fisher v. Hayes*, 6 Fed. Rep. 63; though, even in such a case, it would be certainly more regular to entitle the contempt proceedings in the name of the people; but where the punishment is inflicted for an offense offered to the dignity of the court, as for words or acts in the presence of the court insulting to the judge or in violation of the proper order and decorum of the court room, there the people come to demand judgment and punishment, and there the order and all the proceedings should be in their name. It is not in this technical respect only that the order in this case is defective. On error, in order that the judgment may stand, a good record must be shown. In a criminal proceeding an indictment sufficiently charging facts which constitute a crime, would have to be shown by the record in order to sustain a conviction, and in a civil action, in order to support the judgment, a declaration setting out a cause of action, good in substance, and, in all cases, the jurisdiction of the court over the person of the defendant must be shown by the service and return of process, or by the appearance of the party in court, in the suit or proceeding. *Miller v. Glass*, 14 Ill. App. 177.

In this order no service on the plaintiff in error is shown, and it does not appear that she was present in court when she was adjudged guilty of the contempt. A court may commit for contempt in its presence, without the service of any process on the defendant, but in such case the order of commitment should show that the defendant was present in court when the judgment was entered, else there is no way of ascertaining whether the court had jurisdiction of the person.

The contempt may occur at any time, and the guilty party may be arrested and brought in to answer for it long afterward, but no judgment against him would be valid, which should be entered in his absence and without the service of any process or rule of the court upon him requiring his appearance. *Holcomb v. Cornish*, 8 Conn. 374; *State v. Matthews*, 37 N. H. 450. The order or judgment does not set out in what the con-

tempt consisted. A commitment in contempt is an anomaly in legal procedure. Where the contempt is in the presence of the court, and the punishment is there and then imposed, the commitment need not be preceded by any order to show cause, or by the filing of any interrogatories, or the statement of a charge in any form. *State v. Coff*, 15 N. H. 212. The order of commitment is on the whole record, hence it is, in our opinion, essential that it shou'd contain a statement of the facts in which the contempt is alleged to consist. We are aware that it has been often held that a judgment or sentence for contempt is valid without any recital of the conduct or facts which constitute the contempt. *Rapalje on Contempt*, Sec. 128.

But in such cases there was no authority or jurisdiction to review the contempt proceeding. We have seen that it is the duty of this court to review judgments of courts of record in contempt cases, and it would be idle to confer such jurisdiction and impose such duty, if it is in the power of the court committing, to do so by an order or warrant, general in form, and containing no statement of facts on which the order is based. To so hold, would be to give a review of the form of the order merely, and to deprive a defendant of all opportunity to test, in the appellate tribunal, the question as to whether the act or acts of which he was guilty, constituted a contempt at all. In other words, a direct review on writ of error would avail no more than a collateral examination of the order of commitment or habeas corpus, for in that proceeding the mere question of whether there is, in fact, an order of commitment by a court having power to punish for contempt, may be determined. In many instances, appellate courts have exercised a revisory jurisdiction on habeas corpus, to ascertain whether the order of commitment was rightfully made. *The People v. Hackley*, 24 N. Y. 75; *Burnham v. Morrissey*, 14 Gray, 226; *Commonwealth v. Newton*, 1 Grant's Cases, 453; *Holman v. Mayor of Austin*, 34 Texas, 668.

Such a doctrine grows out of the necessity of furnishing some remedy to the citizen, in jurisdictions where a direct review of the judgment by appeal or writ of error is not

allowed; hence the illogical alternative of turning habeas corpus into a writ of error, and revising collaterally, what the court had no power to review directly. Such decisions, however, seem to demonstrate the propriety, at least, if not the necessity, of a statement in the commitment, of the grounds of the contempt. Where the contempt is in the presence of the court, the proceeding is in the highest degree summary; the judgment and punishment is usually immediate, and upon the spot; the commitment is a commitment in execution. There need be, and usually is, no counsel acting for the accused person, to advise him, or take proper steps to protect his rights. A bill of exceptions in such a case is impracticable, and to hold that unless the facts were preserved, as by such a pleading, the judgment general in form should be held conclusive, would be introducing into a summary proceeding a technical pleading, not for the purpose of promoting justice, but to embarrass the citizen in obtaining relief from what may be an unjust imprisonment. Where, therefore, the only record that is in fact made, or that the law requires to be made, is the order of commitment, and where judgments in contempt are subject to review on error, we hold the reasonable and just rule to be, that the order of commitment should state the facts or conduct constituting the contempt, and that where no statement as to the nature of the acts or words of the defendant is made in the order, the same should be reversed. In other words, where a direct review of such a summary judgment is given by law, it is the duty of the court that makes the order, said order constituting the entire record, to set out fully in the commitment in what the contempt consisted, in order that the Appellate Court can see from the order, whether the judgment is warranted. As said in Bushnell's case, Vaughn, 135, the cause of the imprisonment ought "to appear as specifically and certainly to the judges of the return, as it did appear to the court or person authorized to commit, else the return is insufficient, and the consequences must be, that either the prisoner, because the cause returned of his imprisonment is too general, must be discharged, whereas, if the cause had been more particularly

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returned, he ought to have been remanded, or else he must be remanded; when, if the cause had been particularly returned he ought to have been discharged."

This was said in a habeas corpus case, and while there may be doubt as to the correctness of the rule in such a case, it seems to us to be appropriate and applicable where the sufficiency of the record of a summary conviction is brought to test on review in a direct proceeding. Whatever the judges of this court may have gathered from common report as residents in this community as to the grounds of this contempt, we can, as a court, know only what the record discloses to us, and from this record we can perceive no grounds or basis for the order of commitment brought up for review. For the errors indicated the judgment must be reversed, but there will be no costs against the nominal defendant in error.

Judgment reversed.

JOHN J. PHELAN

v.

MARY PHELAN.

Divorce—Desertion—Refusal to Follow Husband.

A wife is not bound to abandon home, means of support and children by a former marriage, and join her husband in another place, it not appearing that he is engaged in any business, or that he has provided a home for her therein; and her refusal to do so, constitutes no ground for a divorce in proceedings instituted by him upon the plea of desertion.

[Opinion filed March 24, 1890.]

IN ERROR to the Circuit Court of Cook County; the Hon. O. H. HORTON, Judge, presiding.

Mr. GEORGE G. BELLOW, for plaintiff in error.

No appearance for defendant in error.

GARY, P. J. The plaintiff in error filed his bill against the defendant in error for a divorce, on the ground of desertion.

The defendant, at the time of the marriage, was, and had been for eight or nine years, and still is, in business in La Salle in this State. There the parties were married in 1877, and lived together as husband and wife until 1884, when the plaintiff in error came to Chicago, and remained here.

It is probably true that he has several times requested her to come and live with him in Chicago, and that she has refused. He claims that he is entitled to a divorce, and cites *Kennedy v. Kennedy*, 87 Ill. 250.

But in this case the record does not show that the plaintiff is engaged in any business, and it does show that he has no home to which she can come in Chicago.

She is under no obligation to abandon a home and means of support, and children by a former marriage, in La Salle, and follow his uncertain fortune here, under such circumstances.

The decree is affirmed.

Decree affirmed.

36	512
50	498
50	529
35	512
151	588
35	512
86	193

BURR ROBBINS AND D. K. TENNEY

V.

THE J. W. BUTLER PAPER COMPANY ET AL.

Insolvency—Conspiracy—Attorney and Client—Assignment of Errors—Costs.

1. Only appellants can assign errors.
2. Cross-errors can only be assigned on decrees appealed from.
3. An attorney who represented several creditors of an insolvent corporation procured judgment notes for the claims held by him, and also for a creditor who held, as collateral, the notes of the corporation to his clients. entered judgments thereon, filed a creditor's bill, had the corporate assets sold by the receiver appointed therein, and bought in the property himself. The corporate stock was all controlled by one man, who gave the attorney information as to the affairs of the corporation, and whose wife was its principal creditor. It was not shown that the attorney had notice that the claims represented by him were fraudulent. *Held*, that he was not accountable to the other creditors of the corporation for the property bought by him, the evidence not sustaining a charge of conspiracy.

Robbins v. Butler Paper Co.

[Opinion filed March 24, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

MESSRS. CRATTY BROS. & ASHCRAFT, for appellant Burr Robbins.

Mr. A. W. GREEN, for appellant D. K. Tenney.

MESSRS. McCLELLAN, CUMMINS & MOULTON, for appellee The J. W. Butler Paper Company.

MESSRS. TENNEY, HAWLEY & COFFEEN, for appellee W. O. Tyler Paper Co.

Mr. R. A. CHILDS, for appellee Albert Hayden.

MESSRS. GROSSCUP & WEAN, for appellees C. B. Cottrell & Sons.

GARY, P. J. The version relied upon by the appellees to support the decrees appealed from, or so much as is regarded as material for the present discussion of the great mass of facts relating to which the record contains evidence, is as follows: That in the month of February, 1884, John B. Jeffery substantially incorporated himself as the John B. Jeffery Printing Company, with a nominal capital of \$150,000 as the equivalent of property appraised at \$120,492.20, and worth \$54,092.20 and good will of a former business appraised at \$50,000, of which no value is shown; that \$100,000 of stock was issued to him, and \$50,000 to others under his control; for the latter his wife professed to pay \$50,000 to the company, and that amount was, on the company's books, credited to him, though no money was paid; that even then he intended to use the control he had of the company as a means to commit frauds; that he caused judgment notes to a large amount, bearing eight per cent interest, to be issued by the company to his wife, in exchange for parcels of her stock transferred to persons from whom the company bought goods; that he retained the appellant Tenney as attorney in behalf of his wife,

and as such attorney kept him informed of the affairs of the company, and of claims made by others against it; that among such claims were those of Hayden, holding \$15,000 of stock received from Mrs. Jeffery in exchange for real estate conveyed to her by Hayden, under fraudulent representations by Jeffery, who made the trade, and which trade Hayden wished to rescind, and was likely to make trouble; also the claim of Cottrell & Sons, who held \$7,600 of stock transferred by Mrs. Jeffery, and which they claimed that the company was bound to take from them and pay for; and that Jeffery had made divers threats as to what he would do to the prejudice of the company and its creditors.

On the 19th day of May, 1886, after an interview between Tenney and the attorney for Cottrell & Sons, at which, what took place is the subject of conflicting testimony, Tenney received from Jeffery part of the judgment notes against the company for more than \$50,000, and also a check on the bank for Mrs. Jeffery for the balance the company had there, \$4,011.22; went to the bank and got a note of \$25,000 which the bank held against the company and for which the bank also held as collateral security another part of the judgment notes to Mrs. Jeffery, and these Tenney also got; returned to Jeffery and got a judgment note for the note to the bank, in such shape that he could enter a judgment upon it in his own name; also a judgment note for \$5,000 in favor of Robbins, which was either then executed, or if it had been executed before, was still in the hands of Jeffery; and also a judgment note of more than \$22,000 in favor of the W. O. Tyler Paper Co. Upon all these notes he entered judgments, issued executions and levied part of them, more than \$75,000 in amount, immediately upon the property of the company, then procured a return of *nulla bona* upon a part of the executions, filed a judgment creditor's bill, and had a receiver appointed, to whom all the property of the company, including what the sheriff had levied upon, was assigned and surrendered, and thereafter bought, in satisfaction of these judgments, from the receiver, under the authority of the Superior Court of Cook County, where the cause was pend-

ing, all of the assets of the company. Before this sale was made, the present bill of the Butler Company was filed in the same court, and afterward transferred to the Circuit Court.

The theory of the appellees and the ground upon which the decree appealed from went, is that there was a conspiracy to ruin the printing company, defraud its creditors not represented by Tenney, and the stockholders other than Jeffery and his wife, and divert all the assets of the company to the formation of the new one; that as in the execution of the purposes of that conspiracy the assets were applied at a fixed price to the satisfaction of the judgments, the parties who so applied them are to be held as having wrongfully converted them to their own use, and should return them to the receiver in this case, who is appointed as the successor of the one who sold them; that as the assets are not accessible for a return in specie, those parties must pay to the receiver the price at which they took them. Some question is made upon the authority by which the judgment notes were executed. If the case of *Martin v. Judd*, 60 Ill. 78, does not govern this on that point, the objection in point of law, to the authority to execute the notes, is not a ground in equity for these decrees. There is no question as to the actual indebtedness of the company to the bank and Robbins.

The fact that the Tyler Paper Company was liable upon outstanding commercial paper which belonged to the printing company to pay, and which it was easy to foresee that the paper company would have to, as in fact it did, pay, is undisputed. That was a good consideration for the judgment. *Truscott v. King*, 6 Barbour, 346; *Speer v. Skinner*, 35 Ill. 282. That Tenney had the authority of all the parties who obtained judgments, except Robbins, to act for them, is not denied. There is no evidence tending to show that he had any notice of whatever evil intention Jeffery had toward anybody, or of anything which could affect the consideration, validity or good faith of the notes to Mrs. Jeffery. There is no showing as to what the market or intrinsic value of everything applied to the satisfaction of the judgments was, but it

is probable, on the whole case, that it was less than the amount of the judgments.

Tenney having been retained for Mrs. Jeffery by Jeffery, who did all business in which she was interested, must necessarily, to obtain any information affecting her interests, go to Jeffery for it.

Assuming the validity of her claim against the company, which assumption must be made in considering the case of Tenney, because, as before said, there is no evidence that he had any notice to the contrary, there is no act of Tenney shown by this record which is inconsistent with the degree of fair dealing that the law requires of parties in the selfish protection of their own interests. As the bank held a part of her notes as collateral security, it was essential to the collection of her whole debt that the company should pay the bank.

Representing her in so large a claim against the company, it was his professional duty to inform himself, so far as he could, of every circumstance that could affect the ability of the company to pay her. All his consultations with Jeffery were such, so far as any evidence shows, as were in the line of the discharge of that duty. The law permitted Mrs. Jeffery to obtain payment of her debt, if *bona fide*, from the company, though every other claim upon it should remain unsatisfied. As her attorney, with no notice that the debt was not *bona fide*, it was the duty of Tenney to use all his professional skill in obtaining such payment.

In addition to the fact of his frequent, probably almost daily consultations with Jeffery, stress is laid upon the testimony of Tenney himself that he intended, when he parted from the interview with the attorney of Cottrell & Sons, to get his receiver in first—a friendly receiver.

Leaving out of view anything in the record tending to explain or qualify this statement, and considering it in connection with the fact that the assets were used in organizing a new corporation, in the formation of which he participated, the result is that he then contemplated, what a very slight knowledge of business would enable any one to foresee, that

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the only way in which a practical satisfaction of the more than \$100,000 of debts he was authorized to collect would be secured was by appropriating the assets of the company to some new enterprise for continuing the same business in which they were then used.

The assets were a large printing establishment.

It is probable, if not certain, that to break up the business, and sell at public auction piecemeal the tangible property which a sheriff could levy upon and sell, would have been such a sacrifice of the property that the judgments, after applying the proceeds of the sale and all that a receiver could get out of the intangible assets, would have remained unsatisfied to a large extent without any resulting benefit to anybody. In principle, though not in degree, it would have been like selling a railroad under foreclosure, in parcels.

This case presents the unusual feature that Tenney and Robbins are required to pay in cash to the receiver the amount which they acknowledged to have received in satisfaction of *bona fide* debts, which were thereby discharged, and with no evidence whatever of the value of what they received. But this need not be enlarged upon.

The only ground for charging Tenney is that his acts, which were lawful expedients for collecting, under the circumstances, the debts which he had authority to collect, and of any objection to the validity of any of which, there is no evidence that he had any notice, are to be presumed, without evidence, to have been for the purposes of carrying into effect the evil designs of Jeffery, of which, if they existed, there is also no evidence that Tenney had any notice.

It is not so probable, if the notes to Mrs. Jeffery were invalid, that an attorney employed by Jeffery in her interest to collect them, would have been informed by him of that invalidity, that the probability can supply the want of any proof of such information.

There is no need to discuss the case of Robbins. He was not there, and had no knowledge in detail of what was being done. He is only charged with responsibility for the acts of Tenney in his behalf, and if Tenney is justified he is discharged.

Several parties have separately filed cross-errors, but none of them can be considered. The appeals of Robbins and Tenney, though docketed here as one case, are in fact separate for each of them. On those appeals, they only can assign errors. *Beal v. Harrington*, 116 Ill. 113.

And cross errors can be assigned only on the decrees appealed from. *Walker v. Pritchard*, 121 Ill. 221.

None of those cross-errors say the decrees against Robbins and Tenney do not go far enough. All those cross-errors assigned relate to matters in which neither Robbins nor Tenney have any interest.

As to Robbins and Tenney the decrees are reversed and the cause remanded to the Circuit Court with directions to dismiss the bill as to them, at the cost of the J. W. Butler Paper Company.

The costs made in this court by the separate cross-errors and briefs of Hayden, Cottrell & Sons, and the Tyler Paper Company, and by the appeal bond which Jeffery filed, will be paid by those parties respectively. The residue of the costs in this court will be paid by the J. W. Butler Paper Company, and Hayden, Cottrell & Sons jointly.

Reversed and remanded.

SARAH A. CURTIS ET AL.

V.

IDA G. WILLIAMS ET AL.

Mortgages—Foreclosure—Interpleader—Injunction Restraining Suit in Equity—Practice.

1. The owner of land subject to mortgage, who has been made defendant in a suit by the mortgagee to foreclose the mortgage, and in another suit by a former owner of the land to establish his title to the mortgage, may, by bill in the nature of an interpleader, compel such adverse claimants to interplead.

2. Such bill of interpleader should be an original bill and not a cross-bill in one of the former suits.

35	518
50	507
35	518
54	490
35	518
155	280
35	518
108	304

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3. It is no objection to such bill that the complainant therein has filed an answer in one of the former suits.

4. On the filing of such bill a preliminary injunction restraining the prosecution of the former suits may be issued, though no positive injury is shown.

5. On the application for such injunction, the complainant's sworn allegation that the bill is brought without collusion can not be contradicted.

[Opinion filed March 24, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding.

In September, 1885, Margaret A. Humble filed her bill in the Circuit Court, setting up that she had been the owner of certain lots which are particularly described, and that while such owner she was induced by false and fraudulent representations of James M. Allen and Henry H. Armstead to convey said lots to said Allen by deed; that said lots were fully worth \$2,500; that said conveyance thereof was without consideration; that said Allen and wife conveyed the said real estate to one J. B. Armstead; that said last mentioned conveyance was without consideration, and with full knowledge of complainant's equities in said property; charges that said J. B. Armstead is a man of no means; that to further carry out the fraudulent design he executed to one Fay, as trustee, a trust deed of each of the said lots to secure two notes of said J. B. Armstead, each for \$1,500, secured by said trust deeds, which notes were payable to his own order, and by him indorsed and due five years after date, and dated September 1, 1884; that on July 25, 1885, said J. B. Armstead conveyed lot 37 (one of the described lots) to Hattie J. Harvey for \$3,000, as expressed in the deed, being made subject to said trust deed to Fay for \$1,500, which said Hattie J. Harvey assumed, and also on said 25th day of July, 1885, said Armstead conveyed lot 38 to Ida G. Williams, for a consideration expressed of \$3,000, also subject to said trust deed to Fay for \$1,500, which said Ida G. Williams assumed; charges that said Allen and said H. H. Armstead are the hold-

ers of the notes made by J. B. Armstead secured by said trust deeds, and are the actual vendors in interest of said lots; that said notes are still unpaid, and complainant is entitled to the benefit of the proceeds of said sales to the extent of the value of said lots at the time of their said conveyance to complainant, to wit, \$2,500. Several persons are made defendants to this bill; among others, Allen, both the Armsteads, Hattie J. Harvey, and appellee, Ida G. Williams, and an accounting is prayed for, and an injunction restraining Allen and Armstead from negotiating or putting said notes out of their possession, and said Harvey and appellee Ida G. Williams from paying the same, and that on final hearing said Harvey and appellee Williams shall each be decreed to pay complainant the sum of \$1,250, with interest thereon from the time of said conveyance by complainant according to the tender and effect of said notes assumed to be paid by them respectively; said payment to be credited on said notes as a part of the purchase price of said lots 37 and 38.

Appellee answered said bill denying knowledge of the alleged matters of fraud between complainant and said Allen and Armstead, etc., and admitting that she is the owner of said lot 38, subject to the trust deed mentioned, to secure payment of the fifteen hundred dollar note.

In July, 1889, appellee, Ida G. Williams, filed her cross-bill, in which she sets forth, in substance, the contents of complainant's bill, and states that she is the owner of lot 38, and said Harvey the owner of lot 37, subject to the trust deeds mentioned in the original bill; that a reference has been made to the master on the original bill, and he has taken testimony and is ready to return the same with his report into court, recommending a decree against cross-complainant for \$1,250 and interest from December 7, 1883; that cross-complainant purchased said lot 38 without notice of said complainant Humble's rights and claims, and before the filing of said Humble's bill, and before the filing of any of the bills mentioned in this cross-bill. Further shows that on January 20, 1888, one Sarah A. Curtis filed in the Superior Court of Cook County her bill against cross-complainant to foreclose

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the trust deed mentioned in the bill of said complainant Humble, conveying lot 38 to secure said note for \$1,500, and interest thereon, and setting forth that she, said Curtis, was at the time of filing her said bill the *bona fide* holder of said note of \$1,500, and the interest thereon; that a default had occurred by reason of the non-payment of interest on said \$1,500 note by cross-complainant, and by reason of said default she, said Curtis, was entitled to a foreclosure and to a decree against cross-complainant for said \$1,500 and interest and solicitor's fees; that said complainant, Curtis, claims to hold said notes without notice of the claims of said Humble, and that the same are not subject thereto; that said Curtis seeks a decree against cross-complainant for the whole of said \$1,500 and interest, a portion of which said Humble seeks to reach and procure a decree against cross-complainant for in her original bill herein; that each said Curtis and said Humble is prosecuting cross-complainant without regard to the claims of the other, and that neither is a party to the other's bill. That cross-complainant was without fault in not paying interest on said principal note of \$1,500, because she could not safely pay the same by reason of the injunction prayed against from so doing in and by the said original bill of said Humble, and the danger of a decree against her; and that she could not safely pay any of said sum to said Curtis; that under the circumstances said Curtis could not rightfully declare said entire sum due, and that cross-complainant is now only bound to pay the interest due on said note and no more, and that only to the person or persons lawfully entitled thereto; that she has always been willing to pay the money due for interest on said note, and upon the coupon notes as they mature to the person lawfully entitled to receive the same, and to whom she could pay with safety, and that she is ready and willing to pay all the interest coupons now due when and as the same become due to the party or parties entitled thereto when the court shall decide to whom the money belongs, and she offers, on said Humble and Curtis interpleading herein, to pay all money, both principal and interest, due on said \$1,500 note into court as the court shall direct. That she is in danger of having two

decrees against her, and that she does not know and can not ascertain to which of said claimants the fund represented by said notes belongs and should be paid. That she does not in any respect collude with either of the said defendants touching the matters and things above set forth, nor is she in any manner indemnified touching the things above set forth by either of said claimants, but files this bill of her own free will to avoid being molested and harassed touching the matters contained therein; sets up the claims of both parties; claims that they be compelled to interplead; that these respective suits against her be stayed and enjoined, etc.

On the cross-bill, a motion was made, on July 18, 1889, for an order that appellant Curtis, and complainant Humble, answer and interplead in said suit, and said Curtis be enjoined from further prosecuting her said foreclosure suit. The court ordered that said appellee pay into court all the interest then due on said note, and should thereafter pay into court all interest as it shall become due on said note, to remain subject to the further order of the court, and that said appellant Curtis be enjoined until further order of the court from prosecuting the said foreclosure suit, or commencing any other suit to collect said money except by interpleading herein, and cross-complainant was required to give to said Curtis an injunction bond in the penal sum of \$400.

From the order granting this injunction this appeal is prosecuted.

Messrs. KRAUS, MAYER & STEIN, for appellants.

Messrs. ELA & GROVER, for appellees.

MORAN, J. On the hearing of the motion for the injunction, appellant introduced affidavits of different persons and certain evidence taken on a hearing before the master for the purpose of showing that appellee had not maintained the neutral attitude that is required of one who files a bill of interpleader, but that she had espoused the cause of Mrs. Humble, and was in collusion with her in filling the cross-bill,

and on this appeal the chief portion of appellant's argument is devoted to establishing from the evidence thus introduced at the hearing of the motion that appellee did not stand indifferent between Mrs. Curtis and Mrs. Humble, but colluded with the latter, and an elaborate citation of authorities to show that if there has been collusion with one of the parties or a failure to maintain neutrality as between them the bill of interpleader can not be maintained. It is a sufficient answer to appellant's contention on this branch of the case, that the allegation in the sworn bill that appellee does not in any respect collude with either of the parties touching the matters set up in the bill, nor is she indemnified by either of them, nor has she exhibited the cross-bill at the request of either of them, but of her own free will, and to avoid being molested and harassed touching the matters set forth, is conclusive as to the question of collusion at this stage of the case.

In *Langston v. Boylston*, 2 Ves. 101, on a motion for an injunction on a bill of interpleader, it was attempted to be shown that there was a collusion by the plaintiff; the chancellor said that he must take it for granted that there was no collusion, for he could not determine the affidavit of the complainant to be false on a counter-affidavit.

In *Stevenson v. Anderson*, 2 Ves. & Bea. 407, on a similar motion, the chancellor said that though he doubted whether there was perfect good faith on the part of the plaintiff, the court was in the first instance concluded by his affidavit that there is no collusion, and will not admit an affidavit to the contrary, and in *Manby v. Robinson*, L. R., 4 Ch. App. 347, it is held that the plaintiff's affidavit of no collusion in an interpleader suit can not be rebutted before the hearing by a counter-affidavit, or other evidence, and the plaintiff is entitled, notwithstanding such counter-affidavit, to an order of payment of the fund into court, and for an injunction. See also *Toulmin v. Reid*, 14 Beav. 499; *Fahie v. Lindsay*, 8 Oregon, 474, 2 Dan. Ch. Pr. 1563.

Defending a suit brought by one of the claimants to the fund, if the defense is not too far persisted in, should not prevent one from filing a bill of interpleader. In *Jew v. Wood*,

it was insisted that the plaintiff should not be allowed to file the bill because he had attempted to defend himself in an action at law, and had himself brought an action of replevin which was an attack on the right of one of the parties, but it was held by the Master of the Rolls, that the defense set up at law ought not to preclude the plaintiff from relief on his interpleader in equity; and though in *Conish v. Tanner*, 1 Y. & J. 333, it was held that a party could not file his bill after verdict where he had availed himself of every defense which he could use at law, in *Hamilton v. Marks*, 5 De Gex. & Sm., it was said that it was no objection to an interpleader that it was filed after verdict at law where the action at law was only to ascertain the amount of damages; and in *Jacobson v. Blackhurst*, 2 John. & Hem. 436, where a plaintiff in an interpleader suit had previously set up a claim of lien and had pleaded it in an action at law, it was held no bar to the interpleader when it was shown that he had, concurrently with filing the bill, withdrawn the plea. The record in this case shows that the answer of appellee in the foreclosure suit commenced against her by appellant has been amended by leave of court, so as to eliminate from it all hostile or antagonistic assertions, and to leave only a statement of Mrs. Humble's claim as set up in her bill, without any asseverations as to the truth thereof. We think she has not maintained her defensive attitude so long or carried the defense so far that she should, under the circumstances, be held barred on that ground from maintaining her bill. 'This bill is not a strict bill of interpleader. In such a bill the complainant must be a simple stakeholder, and must admit the whole sum constituting the fund to which the conflicting claims are made to be due, and make no claim, and assert no interest in it, and seek no relief by the bill other than to be no further vexed by the conflicting claimants, and it must be shown that the claimants both seek the same thing or fund. Story's Eq. Pl. Secs. 292, 293.]

But there is a remedy by bill in the nature of a bill of interpleader in cases where the plaintiff claims for himself some interest or has some right related to the subject-matter in question which entitles him to a particular relief, or where

he does not admit the whole of defendants' claim, or the defendants claim different amounts. 2 Dan. Ch. P. 1571.

In *Mohawk & Hudson R. R. Co. v. Clute*, 4 Paige, 384, where two different tax collectors were seeking a tax of a different amount upon the same property, and where only one tax was justly due, the bill was retained as being a bill in the nature of a bill of interpleader to ascertain which of the claimants has the legal right to collect the tax, and the case was likened to the case in *Gill Eq. Rep. 4*, where one who was entitled to the equity of redemption in land filed a bill in the nature of a bill of interpleader against two conflicting claimants of a fund, the amount of which was a lien on the premises. See also *Dorn v. Fox*, 61 N. Y. 264. In *Badeau v. Rogers*, 2 Paige, 209, a complainant was allowed to file his interpleader to redeem from a mortgage where there were conflicting claimants to the proceeds, and where a bill to foreclose the mortgage had been filed by one of the claimants. I am of opinion that the allegations in this bill, although it is in some respects inartificially drawn, entitle appellee to maintain it as a bill in the nature of a bill of interpleader. It appears that there are two different claimants who have suits pending against appellee claiming the same fund—the purchase money which remains unpaid on appellee's lot; that one of them claims the whole of the said money, \$1,500, with all accrued interest thereon, and the other claims \$1,250 of said money with interest on said amount from a stated date. That one of the claimants insists that the debt is due because of a default in the payment of interest, and seeks to foreclose the mortgage on appellee's property and sell it, and that the interest was not paid because the other claimant had filed a bill claiming it, and forbidding its payment; that neither of said claimants had made the other a party in their respective bills and that appellee is ignorant of the claimants' respective rights, and can not decide between them and pay the one without incurring the risk of being finally obliged to pay the other. She seeks relief also in that she wishes not to be compelled to pay the money until it is due by the terms of her note, and hence she was not at the filing of the bill an indifferent stakeholder, ready

to pay the whole disputed fund into court. She could not do that without sacrificing her own rights, nor could she persist in refusing to do so with safety, if Mrs. Humble's claim to the fund can not be sustained. There are peculiar features in this case not found in other cases, but it seems to me to present stronger grounds for equitable relief than many cases in which such relief has been granted. The rules of courts of equity in granting relief are flexible. That no adjudged case is found presenting precisely the same ground for relief, is no reason for refusing a remedy in a given case. The case is analogous to many of the cases which have been cited, and in my opinion comes within well settled equitable principles. The appellee was not bound to take the hazard of an adverse decision in either one of the suits, and should not be vexed by the defense of both of them, and has the right to compel adverse claimants to interplead, and relieve her from the burden that would otherwise be imposed upon her. Before the order appealed from was entered she had paid into court the interest that was due upon the note, on a bill similar to this bill, which had been filed in that court as a cross-bill in the foreclosure suit, and which same cross-bill was dismissed because of the pendency of this one. The interest so paid into the Superior Court is directed by this order to be paid into the Circuit Court, and as all that in fact remained to be done to have it in court was to transfer it from the treasury of one court to another, appellee was, in our opinion, entitled to the order restraining appellant from foreclosing the mortgage on her lot for a failure to pay the whole debt, which was not then due, unless Mrs. Humble's claim to the fund is baseless as against appellant. As the whole amount of the indebtedness has now become due by efflux of time, it will be proper for the court, by a further order, to require appellee to pay the whole amount of principal and interest into court, on terms as to a release of her property by the trustee that the chancellor shall deem just. There is a technical objection to this bill that does not appear to have been made to it at any stage of the contention, and which is not made here, but which we notice—that the complainant, if she

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is so advised, may so amend as to bring her case into conformity with chancery practice. Interpleader is an original bill, and is not the proper subject of a cross-bill. The bill in this case contains all that would be necessary in an original bill, but it contains more and is named a cross-bill. For the purpose of the motion and on this review the bill may be regarded as an original bill. *Foss v. First Nat. Bank of Denver*, 1 McCrary, 474, 480.

It has been suggested that the order appealed from should be reversed, for the reason that appellee could obtain the relief sought by setting up Mrs. Humble's claim in her answer to the Curtis foreclosure suit, and requiring Mrs. Humble to be made a party defendant to said suit, and on the first hearing of the case in this court an opinion was filed reversing the injunction order on that ground. It was said to be the aim of a court of equity to do complete justice by settling the rights of all persons interested in the subject-matter of the suit, so that those who are compelled to perform the decree may do so safely; and that if appellant made Humble a defendant, or if Humble made appellant a defendant, a decree in either suit would be a protection to appellee against further claims by either party; therefore the order for injunction was wrong, because there is no need of it.

I express no opinion as to whether Mrs. Humble would be held to be a necessary party to the Curtis foreclosure suit, because, as it seems to me, no such question is presented by this record, and it will be time enough to decide that point when a record is before us on which it arises. It can not be suggested here to defeat this interpleader. The doctrine that an injunction should only be granted where positive injury is made to appear, has no application to the order restraining a defendant in an interpleader from the further prosecution of an action against the complainant.

An injunction or restraining order in such a case is but an incident of the principal order that the defendants interplead. Whether the complainant has stated a case which compels the defendants to interplead, is the main question. The defendants may interplead without being enjoined, but where an

action is already pending it is usual to restrain the further prosecution of it on the fund being paid into court. ✓ The right to file an interpleader can not be defeated by the suggestion that if the party pursued some other course no injunction would be necessary. That would make the right to an equitable remedy depend on the propriety of granting relief that is merely auxiliary to the main relief sought. Where the bill contains equity, and a restraining order is applied for, the question is whether such order is necessary to the attainment of the complete relief sought—not whether, if the complainant had elected to seek some other or different relief, no such order would be needed. A bill can not be dismissed for want of equity because an injunction may be necessary, which, if the complainant had not presented the equity contained in his bill, need not have been issued. ✓

The doctrine of parties that is contended for, would be just as effectual to dismiss a bill of interpleader where no injunction issued as where such an order was necessary; indeed, if the doctrine is sound, it would be a good ground of demurrer to a bill of interpleader in all cases where a suit in chancery had been commenced by one of the defendants to the bill. Such a doctrine would indeed be a novelty in equity jurisprudence. No case is to be found which sustains such a view, but many are inconsistent with it, and some, as will be seen, hold a doctrine directly contrary. Interpleader is an old head of equity jurisprudence, and such bills seem to have been filed as well where suits in equity were pending to which the conflicting claimant might have been made a party, as where actions at law had been brought. In *Birch v. Corbin*, 1 Cox R. 144, a bank which held certain funds and was made defendant in a bill filed by a claimant of the funds, moved the court for a rule on the complainant in the bill to show cause why he had not brought the cause to a hearing or enjoined other claimants to the fund from proceeding against the bank in an action at law; the court said it was impossible for the bank to have the relief, but as the bank was a stakeholder, it might file its bill of interpleader; however, to get the relief sought, it must apply as a plaintiff. If the bank could protect itself by sug-

gesting that other parties claimed, and that they should have been made parties, it is singular that the chancellor should have driven it to a bill of interpleader. In *Lowe v. Richardson*, 3 *Mad.* 277, a bill of interpleader was filed by a captain against the consignee and a person who claimed against the bill of lading, but, it appearing that the defendant who so claimed had filed a prior claim against the captain and the consignee, and obtained an injunction against the captain restraining him from delivering the cargo to the consignee, an injunction on the interpleader was refused, as the captain was protected by the former suit, and his bill was unnecessary. There, it will be noticed, all the persons in interest were before the court as parties. This case is cited (in *Badeau v. Rogers*, 2 *Paige*, 209) in support of the suggestion by the chancellor that a bill of interpleader was unnecessary in that case, because suits in chancery were pending in which the claimants had made each other defendants, and to which the complainant was a party, and in which he might, by petition, have had the same relief. These cases are very far from being authorities that a bill of interpleader will not be allowed when, by bringing in a new party, it could be avoided; they go rather upon the principle that, where a suit is pending between all the parties, full relief will be given there to all, and resort to another suit is unnecessary. But there are a number of cases in which a contrary doctrine has been distinctly held, and where a right to file an interpleader has been sustained when a bill was already pending in which all the parties were in court, and injunctions have in such cases issued in the interpleader suit to restrain proceedings in the prior suit. See *Warrington v. Wheatstone*, 1 *Jac.* 203, where one injunction went to restrain an action at law by one claimant, and another to restrain a bill in chancery by another. Also *Morgan v. Marsack*, 2 *Mer.* 107, and *Crawford v. Fisher*, 10 *Sim.* 479. If the doctrine under consideration was known to equity practice, the question arises, why, in these cases, which were well considered, it was not directed that the claimant in the action at law be made a party to the suit of the claimants

in equity, so that the holder of the fund might be protected, and the interpleader made unnecessary.

In *Prudential Ins. Co. v. Thomas*, L. R., 3 Ch. App., the precise point is, in effect, decided. There one Thomas filed a bill against the company, claiming certain insurance money. A Mrs. Black also claimed the fund, but she was not made a party to Thomas' suit. The company filed its interpleader, and obtained an injunction restraining Thomas from proceeding in his suit. A motion was made to dissolve the injunction, and the court in deciding the case said: "One of the claimants was proceeding in equity to enforce payment, and the other was declaring that she would hold the company responsible if they paid that claimant; and it appears to me that there was a reason why the company should force them to interplead. If Thomas had proceeded at law, it would not have been in his power to have made Mrs. Black a party to the litigation, but having determined to come into a court of equity, nothing would have been easier for him than to have made her a party. He knew that she was a person claiming; he knew that the only reason the company alleged for not paying was, that she was making an adverse claim, and therefore a *bona fide* litigation by him ought to have included Mrs. Black as a party to this suit. *Certainly, the existence of that suit did not stand in the way of the plaintiff's filing a bill of interpleader.*" Clearly, if the right to make Mrs. Black a party to Thomas' suit would bar the company's right to an interpleader, here was an opportunity for the application of such a rule.

The right to file a bill of interpleader has been recognized in New York, where, under the code, the court might in its discretion, direct that all parties in interest should be made parties in the pending actions.

It is said by the Court of Appeals, that the only remedy strictly of right to a party sued by one of several claimants of the same debt or duty, who claims no interest himself, and knows not which to pay, is by an action in the nature of a bill of interpleader, and that the party was not bound to apply to the court to exercise the discretion given by the code to bring

in as defendants to a pending suit all other claimants. *Bary v. Mutual Life Ins. Co.*, 53 N. Y. 536; *Wood v. Swift*, 81 N. Y. 31; *N. Y. & H. R. R. Co. v. Haws*, 56 N. Y. 175, reversing a decision of general term, dismissing the interpleader on the ground that the plaintiff might have made one of the claimants a party to the other claimant's suit.

It is said in some of the cases, the filing of bills of interpleader is not to be encouraged. Chancellor Walworth says, in *Bedell v. Hoffman*, 2 Paige, 201, that they "should never be brought except in cases where the complainant can in no other way protect himself from an unjust litigation, in which he has no interest." But by this the court did not mean to say that such a bill should not be filed where the plaintiff had another equitable remedy open to him. The facts of the case in which the remark was made explain what was meant. The defendants were actually litigating their claims when the interpleader bill was filed; the complainant was in possession, and neither party had commenced any proceedings against him. He really did not need to resort to the court at all.

The doctrine of the parties, as well as the doctrine of interpleader, is a doctrine of equity. A defendant may have an equitable right to have new parties made in a suit against him, and may at the same time have the right to file an interpleader, but there is no rule which requires him to choose one remedy in equity instead of another. If he has a remedy at law, he can not come into equity, but he can not be driven from one remedy in equity because he may have another equitable remedy which may be regarded as more convenient or less troublesome to pursue. This is well illustrated in the *Board of Education v. Scoville*, 13 Kan. 17. There a bill in the nature of a bill of interpleader was filed, and the express objection was taken that it was unnecessary, as the conflicting claimants could be made parties to a pending action and the rights of all parties determined, and the plaintiff protected by the judgment. But the court said, in overruling the point, "There never has been any rule in equity that we are aware of requiring a party to resort to one equitable remedy in preference to some other equitable remedy, where the two remedies

are equally applicable to the facts constituting the cause of action or defense, and where both are equally available to the parties; and we think no such rule has ever existed." It is useless to extend the argument further. On both principle and authority it seems to me clear that appellee can not be defeated in her interpleader by the suggestion that she could have protected herself by seeking to have the claimants made defendants in each other's suits.

It follows from what has been said that the order appealed from must be affirmed.

GARNETT, J. I concur in the opinion of Mr. Justice Moran. At the same time, I think Mrs. Williams was entitled to the remedy suggested in the opinion of the presiding justice, had she insisted upon that course.

GARY, P. J., dissenting. To discuss all the questions suggested by this record, would require almost a complete treatise on pleading and practice in chancery.

In 1885 the appellee took a conveyance of a lot, and assumed to pay an incumbrance on it, created by her grantor, of \$1,500. The appellant bought that incumbrance and now holds it. In September of the same year, Margaret A. Humble, a former owner of the lot, filed her bill in the Circuit Court claiming that she had been defrauded in the sale of the lot, by the persons from whom the appellee derived her title to the extent of \$1,250, and asking to be subrogated to that extent, to the lien of the incumbrance.

In January, 1888, the appellant filed her bill in the Superior Court, to foreclose the incumbrance. Humble did not make appellant defendant to her bill, nor did the appellant make Humble a defendant to hers. Probably neither of them knew of the claim of the other. To the bill of Humble the appellee answered in January, 1886, but said nothing of the appellant's and probably did not then know that the latter held the incumbrance. March 3, 1888, the appellee answered the bill of the appellant, and among other things stated the pendency of the suit of Humble in the Circuit Court, and the

claim she made. July 2, 1889, the appellee filed in the Humble suit in the Circuit Court, her amended cross-bill, making the appellant a defendant thereto, setting forth the pendency of the two suits, and the claims made by the respective complainants, praying that they might be required to interplead and settle their claims between themselves, and for a perpetual injunction against the appellants from prosecuting the pending or any other suit to foreclose.

The Circuit Court ordered an injunction until further order, and from that order this appeal is brought.

The counsel for the respective parties have made lengthy arguments, and cited many authorities to show, on the side of the appellant, that this cross-bill is a bill of interpleader, and as such not sustainable and, on the side of the appellee, that it is not a bill of interpleader proper, but in the nature of one, and as such is sustainable.

There is no final decree, and the case is here only under the special statute of June 14, 1887, allowing appeals from interlocutory orders granting injunctions. Of the merits generally, except so far as incidental, probably only so far as necessary to the inquiry whether the injunction was properly granted, this court, at the present stage, has no jurisdiction.

As the Circuit Court on a final hearing would not be bound by the opinion it held on granting an interlocutory injunction, it can hardly be the law that an erroneous opinion of this court, if given, affirming an order erroneously granting an injunction, would be the law of the case on a subsequent appeal from a final decree on the merits. I shall therefore avoid, as far as may be, any consideration of the general subject of bills of interpleader, and confine myself, as closely as I can, to what incidentally affects the order which is the subject of this appeal.

Now, it is a general rule that if the party has another ample remedy, and does not need the aid of the court by a bill of interpleader for his protection, he should avail himself of that remedy. This principle was applied to the extent of depriving the complainant in such a bill of his costs, in *Bedell v. Hoffman*, 5 Paige, 196, the adverse claimants being already in litigation

with each other in another suit. And *Badeau v. Rogers*, *Ibid.* 209, is similar. This rule received the sanction—but apparently without any application to the case—of the Supreme Court of Rhode Island in *Greene v. Mumford*, 4 R. I. 313. It was applied in *McDonald v. Allen*, 37 Wis. 108, to a bill by a sheriff holding money collected on execution, filed against the plaintiff in the execution, and other creditors of the defendant therein, they claiming that the judgment and execution were fraudulent. The sheriff had his remedy by paying the money into court, and leaving the disposition of it to the court. That he can thus protect himself *see Warmoll v. Young*, 5 Barn. & C. 660.

The rule was applied, without being stated, in *Sablicich v. Russell*, L. R., 2 Eq. 441, to proceedings in admiralty, upon the ground that “inasmuch as two persons can not succeed against the ship in respect of the same subject-matter, it may be supposed that the court of admiralty will do complete justice between the parties.” The case of *Shaw v. Chester*, 2 Edw. Chy. 405, is very emphatic in the same direction. The appellee here had another and simpler remedy than filing a bill for protection against a double claim, and because she had that simpler remedy, and had no need of an injunction, it is wrong.

“Substantial and positive injury must always be made to appear to the satisfaction of a court of equity before it will grant an injunction.” 1 High on Injunctions, Sec. 9.

So that here is the double ground of error in the order: first, it is based upon a bill that should not have been filed because the appellee had another ample remedy; and because she did not need an injunction for her protection. What was that other ample remedy?

By her answer in the Superior Court, the appellee imposed upon the appellant the alternative to make *Humble* a defendant there, or suffer the bill to be dismissed. A supplementary answer in the Circuit Court would have the same effect in that court. *Herrington v. Hubbard*, 1 Scam. 569; *Shields v. Barrow*, 17 How. (U. S.) 130.

“It is the constant aim of courts of equity to do complete

justice, by deciding upon and settling the rights of all persons interested in the subject-matter of the suit, so that the performance of the decree of the court may be perfectly safe for those who are compelled to obey it." Story's Eq. Pl. Sec. 72; to the same effect 1 Dan. Chy. 190.

The principle has been so often declared by the Supreme Court of this State, from Gilliam & Cairns Breese, 164, down, that it would be affectation to cite cases. If appellant made Humble a defendant, or if Humble made appellant a defendant, then a decree in either suit to which both appellant and Humble were parties, would be a protection to the appellee against further claims of both of them, and a decree safe for her to perform.

The great multitude of cases cited by the counsel of the appellant, that in foreclosure suits, holders of estates or interests in, or claims upon, the lands, adverse or paramount to the estate accruing under the mortgage, need not be made parties, have no application to this case.

Humble claims nothing in the land. She admits the title of Williams to it; admits that the land is beyond her reach, but says that this unpaid mortgage upon it, is a fund into which property of which she was defrauded, has been converted, and to the benefit of which, principles of equity give her a title. Whether, assuming the facts to be as she alleges, she could have the relief she asks, would be one of the appropriate topics of the treatise to which I alluded in the first sentence of this opinion. No declarations made in a suit to which she is not a party will cut her off from that relief, or protect Williams against it, if she is entitled to it, and without giving her an opportunity to be heard, no court can say that she may not be so entitled. Trigg v. Hitz, 17 Abb., Pr. 436.

The only case cited to oppose this view is Harrison v. Pike 48 Miss. 46, in which the court held that on the showing made by the defendant the absent party had no claim.

The court did not deny the general rule, but said if the things alleged were proper to be adjudicated in that suit, the defendant should have made the absent party a party to the

cross-bill, or put the complainant under a rule to do so. — v. Walford, 4 Russ. 372, is similar in principle. If the want of all necessary parties does not appear on the face of the bill, it may be shown by answer. Herrington v. Hubbard, 1 Scam. 569; Prentice v. Kimball, 19 Ill. 320; Lietze v. Clabaugh, 59 Ill. 136; Hopkins v. Roseclaire, 72 Ill. 373; Gerard v. Bates, 124 Ill. 150; Augustine v. Doud, 1 Ill. App. 588; Story's Eq. Pl. Secs. 236-541.

The complainant may probably take issue upon the answer, instead of amending by making the absent party defendant, but then, at the hearing, if it appear that he ought to have amended regularly, the bill would be dismissed with costs, and leave to amend at that stage denied. Van Epps v. Van Deusen, 4 Paige, 64; Lord v. Underdunk, 1 Sand. Ch. 46. There can be no foreclosure unless the parties entitled to the whole mortgage money are before the court. Palmer v. Carlisle, 1 Eng. Ch., 1 S. & S. 423. And if there be an adverse claimant to the money, he must be made a party. Fowler v. Doyle, 16 Ia. 534. The same principle is recognized in Sec. 11 of the Garnishment Act, and was before that act applied to garnishments in Born v. Staaden, 24 Ill. 320. Therefore, as the appellant could not carry on her suit without making Humble defendant, after the answer of the appellee had shown the interest of Humble, the injunction was needless, and the order granting it erroneous, and that order ought to be reversed and the cause remanded, in my opinion, but the majority of the court is against me.

After all, however, practically as to this case, it is only a question of costs. From the judgment of this court, in this class of cases, there is no appeal, and the appellee, if the opinion of the court or this be followed, will be protected against the double claim.

Roblin v. Yaggy.

DAVID H. ROBLIN

v.

LEVI W. YAGGY.

35	537
89	406
51	586
35	537
91	80
91	92

Practice—Bill of Exceptions—Amendment—Filing of—Review on Appeal—Failure to Except.

1. An amendment to a bill of exceptions made solely on the recollection of the trial judge and filed after the end of the term and after the time allowed for filing exceptions, is void.

2. Where a case is tried by the court and the bill of exceptions shows no exception to the finding or the judgment, no motion for a new trial, no submission of any proposition of law to the court, and no exceptions to the rulings on evidence, there is no question for review on appeal.

[Opinion filed April 21, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. ABBOTT & BAKER, for appellant.

Messrs. W. C. GOUDY, JAMES E. MUNROE and IRA J. GEER, for appellee.

GARNETT, J. The motion of appellee to strike from the files the supplemental transcript of record filed in this cause on March 24, 1890, must be sustained. The only thing therein which could be of benefit to appellant is what purports to be an amendment to the bill of exceptions, the same being signed and sealed by the trial judge on March 22, 1890. The judgment was rendered December 6, 1889, twenty days being then given by order of court to file bill of exceptions, and the time was afterward extended fifteen days. Hence the amendment was filed long after the time specified and after the term had elapsed when the court had control of its records, and as it affirmatively appears that the amendment was made solely upon the recollection of the trial judge, his action in making the amendment was unauthorized and void. *In re Annie Barnes*, 27 Ill. App. 151.

The cause was tried by agreement before the court without a jury. The original bill of exceptions does not show any exception to the finding of the court, or that there was a motion for a new trial, or any proposition of law submitted to the judge, or any exceptions to the judgment, and as no question is presented as to the rulings of the court in admitting or excluding evidence, there is no question which this court is required to review. *Gould v. Howe*, 127 Ill. 151.

But on the merits of the case we are of opinion appellant failed to make out a case of recovery against Yaggy.

The judgment is affirmed.

Judgment affirmed.

EDWIN S. DOUGLAS, IMPLEADED, ETC.,

V.

CANUTE R. MATSON, FOR USE, ETC.

35	538
53	572
35	538
68	459

Practice—Waiver of Replication—Allowing New Plea at Trial—Replevin.

1. Going to trial without an issue being made up on one of the pleas is a waiver of the formal issue thereon.

2. The refusal to allow a new plea to be filed at the trial can not be assigned as error in the absence of any showing as to the grounds of the request.

[Opinion filed April 21, 1890.]

IN ERROR to the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. ALBION CATE, for plaintiff in error.

Mr. B. M. SHAFFNER, for defendant in error.

MORAN, J. This was an action of debt on a replevin bond. The declaration is in the usual form, and assigns as breaches that the plaintiff in the replevin did not prosecute his action with effect, and although the court awarded a return of the

Douglas v. Matson.

goods and chattels replevied to the defendant, in the replevin, the said plaintiff in replevin did not make a return of the said goods and chattels or any part thereof. The defendant, Douglas, filed a plea of *non est factum* and a special plea averring that the merits of the replevin suit had not been tried, that the title and right of possession of the goods and chattels was in the replevin plaintiff at the time of the replevin suit and since, etc.

The parties went to trial without a replication being filed to this plea. It is contended that the failure to file a replication was to admit the facts alleged in the said special plea. It has long been settled in this State that proceeding to trial without an issue being made up on one of the pleas, is considered as a waiver of the formal issue, and the trial proceeds as though the issue on such plea was in fact formally tendered. *Ross et al. v. Reddick*, 1 Scam. 73; *Kelsey v. Lamb*, 21 Ill. 559; *Strohm v. Hayes*, 70 Ill. 41.

On the trial plaintiff did not show that a judgment of *retorno* had been rendered in his favor in the replevin suit, and the court held that he need not do so, as the allegation in the declaration that there was such judgment was not traversed by the pleas, and was therefore admitted.

Thereupon defendant asked leave to file a plea *instantanter*, denying that any judgment for *retorno* had been rendered, but the court refused the leave. This action of the court is assigned as error.

Such a motion is always addressed to the discretion of the court, and action thereon can not, as a rule, be reviewed.

If it were proper subject of review, there is nothing in this record to show what were the grounds on which the court was asked to grant the leave. Where a party asks the court for a favor, he should present some reason to move the court to grant it, and if there is no showing, it is impossible for a reviewing court to say that the court erred in denying the request.

Every presumption is in favor of the justice of the court's action. It certainly was not a matter of course to allow a new plea to be filed on the trial, and it would require strong

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Obermann Brewing Co. v. Adams.

circumstances to make it proper for the court to allow an issue to be made on the trial, on an allegation which the plaintiff, from the course of pleading, was entitled to regard as admitted. Counsel argues that this allegation was not, in fact, admitted, and speaks of the plea of *nil debet* as if such a plea were on file.

No such plea is found in the record. If, in fact, there was such a plea standing in the case, a different question would be presented.

There is nothing in the record which at all distinguishes this case from the case of *Boyden v. Williams*, 83 Ill. App. 477. The judgment of the Superior Court is correct and must be affirmed.

Judgment affirmed.

J. OBERMANN BREWING COMPANY

v.

WILLIAM D. ADAMS ET AL.

103 Ill. App. 632.

Evidence—Conversation through Telephone—Letter—Secondary Evidence—Notice—Sales—Guaranty.

1. Evidence of a conversation by telephone between plaintiff and some one at defendant's place of business, is not admissible as against the defendant, in the absence of proof as to who was the person with whom plaintiff talked.

2. Secondary evidence of a letter sent to the opposite party, is not admissible where no notice to produce the letter has been given.

[Opinion filed April 21, 1890.]

IN ERROR to the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. SIDNEY C. EASTMAN and BOWEN W. SCHUMACHER, for plaintiff in error.

Mr. GEORGE W. PLUMMER, for defendants in error.

GARNETT, J. This is a suit in assumpsit by appellees for the price of liquors alleged to have been sold by them to appellant. From the judgment in plaintiffs' favor, the appellant brings this appeal. The circumstances of the sale of the liquors were these: About May 12, 1886, a man by the name of O'Brien went to appellees' store and told Albert L. Smith, one of the firm that he was authorized by appellant to purchase a stock of liquors and cigars for a saloon, which appellant intended to open for him at 194 Randolph street, in Chicago, and at the same time presented a card upon which G. J. Obermann, the vice-president of appellant, had written:

"Th. O'Brien, is fitting up a saloon, No. 194 Randolph; we guarantee payment for any fixtures or work done for the place, ordered by him.

"J. OBERMANN BRG. Co."

While Smith was talking to O'Brien, Tanner, another of the appellees, called up appellant through the telephone. On the trial in the Circuit Court, Tanner was permitted, over the objection and exception of appellant, to testify to the conversation he held through the telephone with the person at the other end of the wire, and Smith was allowed to testify to what Tanner said while at the telephone. Tanner admitted he did not recognize the voice of the person who spoke to him through the telephone, as he never knew any of the "people" before, and that he could not tell whether it was in Obermann's voice or not, as he did not meet him until some months afterward. Smith did not hear the voice and consequently could not say who the party was. Tanner testified, however, that he asked through the telephone if O'Brien had authority to buy goods for the Obermann Brewing Company for their saloon at No. 194 Randolph street, and an affirmative answer was given.

O'Brien's authority to purchase the goods on appellant's credit was the very point in issue. Now, the admission of the evidence went to the merits of the case, and was clearly

error, and its evil effect was not neutralized by anything found in the record.

The parties in charge of appellant's office, and having authority to speak for it in such matters, testified that they received no such communication by telephone, and denied O'Brien's authority to make the purchase for appellant or on its credit. For aught that appears the inquiry of Tanner may have been answered by a teamster or laborer who then happened to be in appellant's office, but having no right whatever to answer questions of that kind.

Another error assigned by appellant is the refusal of the court to allow it to introduce secondary evidence of the contents of a letter alleged to have been sent by it to appellees.

Whether the letter was received by appellees or any of their firm was not proved. It may have been received, and if it was, notice to produce it should have been given. As no such notice was served, the ruling of the court on this point was right. For the error in admission of improper evidence the judgment is reversed and the cause remanded.

Reversed and remanded.

35 542
64 506

GILBERT B. WATROUS AND NANCY M. WATROUS

v.

ISAAC DAVIES.

Mechanics' Liens—Evidence—Quantum Meruit.

In a suit for mechanic's lien where the mechanic was wrongfully discharged, the value of the work done must be measured, under Section 11 of the Lien Act, in proportion to the contract price of the whole work.

[Opinion filed April 21, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Messrs. MERRITT STARR and W. D. WASHBURN, for appellants.

Messrs. W. H. Sisson and C. F. Gooding, for appellee.

GARY, P. J. This case was so loosely tried upon the evidence in the Superior Court, and the appellants relied so much upon the strict law, and so little upon the facts and merits, that they could hardly have ground for complaint, if they suffered injustice as the result. But it is nevertheless reasonably certain that the appellee has got a decree for a great deal more than he is justly entitled to.

The contract between the appellee and G. B. Watrous, appellant, was to furnish material and do the carpenter work of some houses for \$3,250. He performed a part of the contract, and enumerates in his testimony the particular items, which he says come to \$1,346.

He has been paid \$981, without reference to a payment of \$160 for lumber which the appellants seek to charge him with. In a vague, ambiguous way, which might, if by itself, have to stand as the whole truth, he does testify that the value of the building or work that he did upon the building, and the material that he furnished was \$2,302; that the materials were all put into the building, and that after giving credit for the money he had received there was due him for what he did and furnished for the building, \$1,300.

Whether he was rightly discharged from the work was for the court to decide upon conflicting evidence. That decision this court would not disturb if the case turned upon that question. The contract did not leave it to the judgment of the architect or of Watrous, whether the appellee had given cause for his discharge, and to justify it, sufficient cause must be proved on the trial. If unjustifiable, then, as such discharge would prevent performance by appellee, he would be entitled, under Sec. 11 of the Lien Act, to a lien for what he had done, and would not need any certificate from the architect as to the amount. Such wrongful discharge, being a rescission by Watrous, would relieve the appellee from all the terms of the contract, except that the value of what he had done would, under that section, be measured in proportion to the price stipulated for the whole.

There was no effort to get at that proportion in this case. The testimony of the architect that \$1,000 was the value of all the appellee had done, would not necessarily overcome the testimony of the appellee if this were clear and unambiguous, but the appellee has by his own writing corroborated the architect almost to the figures the latter gives. In a letter dated ten days before the contract should have been completed, in which no complaint was made of delays by masons, as he testified on the trial, he writes that he is prepared and has been to carry out his contract according to its letter and spirit; that he had the lumber on the ground, and is prepared to offer bond and furnish parties who will complete the contract for \$2,000. There is no dispute that Watrous paid \$2,700 to have the work finished. For want of any show of compliance with Sec. 11 of the Lien Act as to the amount of the recovery, the decree must be reversed, but more pains should be taken on another trial, to show the real merits.

Reversed and remanded.

35 544
142 19
35 511
63 491
35 544
164 631

FRANK F. COLE

v.

ELEANOR L. COLE.

Divorce—Alimony—Adultery after Divorce.

1. Adultery of the wife after divorce is no ground for vacating a previous order allowing her permanent alimony.
2. The authority of a court to vacate the order for alimony can not be questioned, upon a showing of sufficient cause.

[Opinion filed April 21, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Messrs. A. B. JENKS and D. T. DUNCOMB, for appellant.

Mr. HENRY M. PIERCE, for appellee.

GARY, P. J. September 20, 1884, a decree for a divorce was entered in the Superior Court in favor of appellee against the appellant, and by a subsequent order, \$50 per month alimony was allowed to be paid by him to her, commencing June 1, 1885. October 27, 1887, he filed in that court a petition stating that he paid \$200 of such alimony, and asking that the order be vacated because when, and ever since it was entered, she had been constantly guilty of adultery. She demurred, the court sustained the demurrer, and his petition was dismissed.

The authority of the court to vacate the order for alimony can not be questioned, if there be cause to do so. Sec. 18, Ch. 40, "Divorce;" Stillman v. Stillman, 99 Ill. 196.

But the divorce puts the parties in the position of strangers to each other, as to their moral conduct thereafter. Her claim on him under the order of alimony is merely pecuniary, not to be affected by her vice or virtue, any more than if the recurring sums for alimony were installments upon a land purchase. This does not seem to be a very sentimental view of the relations of the parties, nor is it characterized by a very high moral tone, but it is the result of the authorities. '2 Bish. M. and D. Sec. 478; Cross v. Cross, 63 N. H. 444.

New permanent means of support, by re-marriage, are held in the case in 99 Ill. to be cause for vacating such an order, and support by a paramour, was held in Holt v. Holt, 1 L. R. P. and D. 610, to be an answer to an application by a wife defending, for temporary alimony, while it continued, but not after it ceased.

The order or decree dismissing the petition is affirmed.

Decree affirmed.

ARNOLDUS VAN STAVERN ET AL.

V.

P. C. SEARS.

Practice—Appeal from Justice—Filing Transcript—Jurisdiction.

Where an appeal from a justice is taken by filing bond with the clerk of the court and the transcript is not filed ten days before commencement of the term, the court has no jurisdiction to try the case at that term, except by consent of the parties.

[Opinion filed April 21, 1890.]

APPEAL from Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. GEORGE W. WOODBURY, for appellants.

Mr. A. E. WHITNEY, for appellee.

GARY, P. J. It is unnecessary to consider the merits of this case, for however just may be the demand of the appellee, as the Superior Court had at the time the case was tried, no right under the statute to proceed in the cause without the consent of the appellants, the appellee must pay the costs of this appeal as a penalty for his obstinacy in pressing the case to trial.

It was an appeal from a justice of the peace, taken by filing a bond with the clerk of the court, September 21, 1889. After that is done, all the further steps requisite to perfect the appeal are, by statute, to be taken by officers, and not by the party appealing. Secs. 65-6, Justices Act. The duty of the party is all performed when he files his bond and pays the statutory fees, except so far as it may be implied that he is to bring the knowledge of the supersedeas to the justice and constable, and deliver to the sheriff the summons to his adversary.

The first day of the November term, 1889, of the Superior Court, was the fourth day of the month, and the transcript from the justice was filed in that court, October 28, 1889,

Frank v. Thomas.

seven days only before the beginning of the term. The appellants applied for a continuance, because the transcript had not been ten days on file, which, being denied, they excepted. They then made an unavailing defense on the trial. Every feature of the case is covered by what is said by Bailey, J., on page 546, in *Ogden v. Danz*, 22 Ill. App. 544, where he cites numerous cases.

The judgment is reversed and the cause remanded.

Reversed and remanded.

JACOB FRANK
V.
MARY A. THOMAS.

Appeals—Bond—Giring of by One of Two Appellants—Lease—Confession of Judgment—Record—Jurisdiction.

1. The fact that an appeal bond is given by only one of two joint appellants, though cause for dismissal of the appeal, will not prevent the court from considering the errors assigned where there is no motion to dismiss.

2. A provision in a lease to two lessees that "the party of the second part" authorizes any attorney to enter "their" appearance and confess judgment, gives authority to confess judgment against both lessees.

3. Where confession of judgment on a lease is entered in term time, the copy of the lease attached to the declaration becomes no part of the record.

[Opinion filed April 21, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

Mr. JOHN C. KING, for appellant.

Messrs. CUTTING & AUSTIN, for appellee.

GARNETT, J. Judgment by confession having been rendered in the Circuit Court against Jacob Frank and Rebecca Grinsberg in favor of Mary A. Thomas, the defendants entered a motion to set aside the judgment. Upon denial of the motion defendants excepted and jointly prayed an appeal

35 547
66 593

to this court, which was granted by order of the Circuit Court, but Frank alone gave an appeal bond. The failure of the other appellant to join in the bond would have been cause for dismissal of the appeal (*Hileman v. Beale*, 115 Ill. 355), but appellee having made no motion to dismiss, the points made for vacating the judgment remain for brief consideration.

The judgment was for rent due on a lease made by plaintiff to the defendants. The motion to vacate the judgment states that by the terms of the lease any attorney of any court of record was authorized by "the *party* of the second part," to enter *their* appearance in such court and confess judgment. Appellant says the word *party* is singular and whether it applies to Frank or Grinsberg does not appear. The bill of exceptions sets forth nothing but the motion to vacate the judgment. No affidavit was submitted with the motion, nor evidence of any kind given in support of the grounds assigned therein. The judgment having been entered in term time, the copy of the lease attached to the declaration is no part of the record. *Waterman v. Caton*, 55 Ill. 94; *Schmitt v. Baur*, 33 Ill. App. 92.

The lease itself should have been presented to the court on the hearing of the motion, or if it could not be obtained, its contents should have been proved, and the bill of exceptions should have set forth the evidence. Otherwise it can not be brought to the attention of this court. But conceding that the motion truly states the terms of the power, we think there clearly was authority to confess judgment against both defendants.

The motion also states that there had been another judgment before a justice of the peace for "the same said supposed default in the payment of rent;" whether the other alleged judgment was before or after the confession now complained of is not stated, but in any event, as already shown, there was no evidence presented in the bill of exceptions to sustain any of the facts charged in the motion, and so the action of the Circuit Court is left unimpeached.

The order of the Circuit Court denying the motion to set aside the judgment is affirmed.

Judgment affirmed.

Matson v. Taylor.

CANUTE R. MATSON

v.

GEORGE H. TAYLOR AND JOSEPH T. MIX.

85	549
198s	*285

Sales—Attachment—Title—Justification by Sheriff—Evidence.

1. Evidence that certain goods had been ordered by plaintiffs and been consigned and shipped to them and that they had examined the goods and were just about to pay the freight when the goods were attached by a creditor of the consignor, is not conclusive that plaintiffs were entitled to the goods in the absence of any showing that plaintiffs had paid or agreed to pay for them.

2. In such case the court should not take the question of ownership from the jury.

3. In order to justify taking goods out of the hands of a third person, under a writ of attachment, it must be shown that the attachment was based on a valid debt.

[Opinion filed April 21, 1890.]

IN ERROR to the Circuit Court of Cook County; the Hon.
ARBA N. WATERMAN, Judge, presiding.

Messrs. KRAUS, MAYER & STEIN, for plaintiff in error.

Messrs. TENNEY, HAWLEY & COFFREN, for defendants in error.

MORAN, J. Defendants in error brought an action to recover the value of two carloads of paper which had been seized and sold by plaintiff in error, as sheriff, under an attachment against the firm of A. T. & F. W. Denison, of Detroit, Michigan. The plaintiffs below proved that the paper had been ordered from the Denisons, and had been shipped consigned to said plaintiffs, and that it had been examined by them to see if it corresponded with the quality or grade required, and that they were just about to pay the freight on it and take it away, when it was, while still in the possession

of the railway company, levied upon and taken by the sheriff under a writ. On the trial, after the defendant below had put in his evidence on the defense, the court instructed the jury to find a verdict for the plaintiffs for the value of the paper, which was accordingly done, and judgment was entered thereon.

We agree with counsel for defendants in error that defendant below failed in making out a justification for seizing the property. It was necessary for them to introduce, besides the attachment writ on which the levy was made, evidence tending to show that the defendants in the attachment suit were indebted to the plaintiffs therein, and this they failed to do. "In connection with the justification by an officer or creditor of an attachment of goods in the hands of a third person, whose possession and title are alleged by the former to be fraudulent, it is important to note that the officer or creditor must not rely merely on the production of the attachment, but must go further, and prove the defendant's indebtedness, and also that the attachment was regularly issued. A failure to prove either of these matters will be fatal to the defense." Drake on Attach. Sec. 225; Waterman on Trespass, Sec. 609.

But it was not necessary for the defendants to establish a justification till plaintiff had established a right to recover by showing his possession or ownership of the goods at the time of the seizure on the attachment writ. We have examined the evidence introduced to support plaintiff's claim, and we are unable to say that it is conclusive of plaintiff's right to the paper in controversy. It nowhere appears distinctly that plaintiffs ever bought the paper from the Denisons. There is no evidence as to the terms of the purchase and it is not shown that plaintiff ever agreed to pay or ever did pay anything for it. It is said that the paper was ordered by the plaintiffs from Denisons, and that it was sold (as it would seem) by plaintiffs before it was ordered, but that is consistent with the theory that the plaintiffs were acting as the agents of the Denisons in selling the paper or taking the order, and there is further evidence in the case consistent with that theory, notably, the conversation of plaintiff Taylor with the attor-

Bolander v. Peterson. †

ney of the attachment creditors on the day the attachment writ was served.

It may be admitted that from the whole evidence it might be inferred that plaintiff had purchased the paper, but it must also be admitted that there is much support in the evidence for the contrary inference.

Now, where such conditions exist, it is not competent for the court to take the question of fact from the jury and direct a verdict. The inferences which may be drawn from facts and circumstances which may support conflicting theories in a case are peculiarly for the jury. It was therefore error for the court to instruct the jury to find for the plaintiffs, and for said error the judgment must be reversed and the cause remanded.

It is not necessary to discuss other alleged errors in the case.

Reversed and remanded.

HENRY M. H. BOLANDER

v.

CHARLES W. PETERSON.

35	551
136	215
35	551
51	233

Injunctions—Trade Name.

The word "Snusmagasinet," meaning "Swedish Snuff Store" can not be appropriated as a trade name, being merely descriptive of the business.

[Opinion filed April 21, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. LOREN C. COLLINS, Judge, presiding.

Messrs. FREEMAN & WALKER, for appellant.

Messrs. COOK & UPTON, for appellee.

GARNETT, J. In September, 1886, appellant, a dealer in snuffs at No. 95 East Chicago avenue, in the city of Chicago, adopted the words "Svenska Snus Magasinet," as the name of his store, placing a sign thereon with those words on it. Over that name he has ever since offered his goods to the public, his letter heads, cards, labels for packages of snuff and newspaper advertisements bearing those words, which he now alleges an exclusive right to use as a trade name, on the ground that he was the first to appropriate the same.

In the summer of 1889, appellee, also a dealer in snuffs, at number 39 East Chicago avenue, altered the sign on his store from "C. W. Peterson, Nya Snus Fabrick," to "C. W. Peterson, Svenska Snus Magasin," and advertised his store by the name of "Fran Snus Magasinet." The newspapers used by both parties to advertise their snuffs were Swedish papers, read exclusively by Swedes, who are the chief consumers of the snuffs. The bill alleges that, by the means described, appellee has misled the trade, and caused it to be believed that his goods are the goods of appellant, whereas appellee's goods are much inferior to appellant's, and thereby the reputation of appellant's store and goods is seriously impaired. A temporary injunction was granted on the prayer of the bill, restraining appellee from employing in any advertisement, the name "Svenska Snus Magasinet," or "Fran Snus Magasinet," or "Svenska Snus Magasin," or any name similar thereto. Appellee having demurred to a part of the bill and answered the rest, a motion to dissolve the injunction was heard, on the bill, answer and affidavits. The injunction was dissolved and thereupon, on motion of appellant, the bill was dismissed for want of equity.

From the affidavits, it appears that the appellant's label for his packages was thus:

Anchor Brand
NORRKÖPINGS.

SNUS

TRADE MARK.

SVENSKA SNUS MAGASINET

SOLE AGENTS.

CHICAGO ILL.

[Printed in black upon white ground, with an anchor
printed in red across its face.]

And appellees' this:

EAGLE BRAND



TRADE MARK.

STOCKHOLM.

--S N U S--

—

C. W. PETERSON

MANUFACTURER

39 EAST CHICAGO AVENUE CHICAGO ILL

NOTICE.

Factory No. 8, First District Illinois.

The manufacturer of this SNUFF has complied with the requirements of law. Every person is cautioned under the penalty of the law, not to use this package for snuff again.

[Printed in black upon green ground.]

Bolander v. Peterson.

The appellant's advertisement in the newspapers was this:

Se noga efter
Skyddsmärket Trade Mark. Ej åkta utan det.

Har eder hand-
lande det icke in-
sänd En Doller
och Ni erhåller
1½ pund af upp-
gifven sort fritt
på posten.

Anchor
Rekommende-
radt af
BRAND
Förbrukare
SNUS

Följande sorter
finnas: Stock-
holms, Göte-
borgs, Norrköp-
ings, Jönköpings,
Kalmar, Karl-
shamn, m fl.

Addressera: SVENSKA SNUSMAGASINET,
95 E. Chicago Ave., Chicago, Ill.

、 [Printed in black upon a white ground; the words trade mark were printed across an anchor.]

And appellee's this:

FRÅN SNUSMAGASINET,



39 Chicago Av., expedieras alla sorters Svenskt snus (starkt, friskt och godt). Mot insändandet af en dollar, erhåller ni fritt per post $1\frac{1}{2}$ pund snus.

C. W. PETERSON, 39 Chicago Av., Chicago.

[Printed in black upon a white ground.]

What is the English equivalent of "Svenska Snus Magasinet," is matter of contention. There is no denial of the fact that the terminal "et" means "the." It is admitted that "Svenska" means "Swedish."

The bill alleges that "Svenska Snus Magasinet" means "The Swedish Snuff Magazine," and appellant's affidavit states that "Snus Magasinet" means "The Snuff Magazine."

He is corroborated by his witness, Englund, who swore that the proper designation, in Sweden, of a place where snuff is sold is "Snusbod;" that he never saw nor heard in Sweden the word "Snusmagasin" used in that connection and combination, and does not believe that any such words are used there to describe a place where snuff is sold.

Another affidavit in support of the bill was made by John A. Enander, who swore that he was editor of "Hemlandet," a Swedish newspaper published in Chicago; that he was a graduate of the college at Wenersborg, in Sweden, and famil-

iar with both the Swedish and English languages; that the word "magasin," in Swedish, signifies, when combined with another word like "snus," a place where snuff is sold; that the words "Svenska snusmagasinet," used in that combination, mean in reality only a Swedish "magazine" for snuff, and do not mean grammatically, and do not convey to Swedish ears the idea of a place where imported Swedish snuff is sold. The latter fact is stated in answer to the charge by appellee that appellant was trying, by his advertisements, to falsely impose upon his customers snuffs made by himself in Chicago as goods imported from Sweden. On the other hand, there is the affidavit of Hannah Frost, stating that she is a Swedish scholar, and that "snus magasin" means, in English, "snuff store;" and the affidavit of Ivan Candors to the same effect. The affidavits also tend to prove, and we think do prove by a fair preponderance, that "snus magasin" was commonly employed in Sweden, many years before this controversy arose, as the designation of a snuff store.

From this statement of the evidence it is quite clear that no fault could be attributed to the Circuit Court if it found, as a matter of fact, that the words sought to be exclusively appropriated by appellant mean "the Swedish snuff store," and assuming, as we should, in support of the decree, that such was the finding, no difficulty is perceived in reaching a correct conclusion.

It will be observed that, beyond the use of the phrases "Svenska snus magasin" and "Fran (from) snusmagasinet," there is no ground of complaint whatever against appellee. In no other respect is there any similarity between the two advertisements, and between the two labels there is no resemblance of device, words or other thing tending to deceive.

So far as the allegations of the bill are concerned, the contention of appellant is for the exclusive right to use the words in question as a trade name; what he complains of is not an infringement of a trade mark, as a sign upon a store or in an advertisement constitutes no part of a trade mark. *Ball v. Siegel*, 116 Ill. 137; *Browne on Trade Marks*, Sec. 98; *Candee v. Deere*, 54 Ill. 439.

Assuming, however, as appellant does, that the same principles which apply to trade marks also apply (as far as the subject thereof permits) to trade names, the authorities are adverse to the claims of appellant.

Originality of invention is not essential to the protection of a trade mark, if, in itself or by its association, it points to the origin or ownership of the goods. But no one acquires a right to the exclusive use of a name which would clothe him with a monopoly of the sale of any goods other than those produced by himself. A generic name, or one merely descriptive of the article or its qualities, ingredients or characteristics, is entitled to no protection in favor of one using it as a trade mark. *Canal Company v. Clark*, 13 Wal. 311; *Ball v. Siegel*, *supra*.

To quote from the opinion in *Canal Company v. Clark*, *supra*: "And it is obvious that the same reasons which forbid the exclusive appropriation of generic names, or of those merely descriptive of the article manufactured, and which can be employed with truth by other manufacturers, apply with equal force to the appropriation of geographical names, designating districts of country. Their nature is such that they can not point to the origin (personal origin) or ownership of the articles of trade to which they may be applied. They point only to the place of production, not to the producer, and could they be appropriated exclusively, the appropriation would result in mischievous monopolies. Could such phrases as 'Pennsylvania wheat,' 'Kentucky hemp,' 'Virginia tobacco' or 'Sea Island cotton' be protected as trade marks? * * * It must then be considered as sound doctrine that no one can apply the name of a district of country to a well known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district, or dealing in similar articles coming from the district, from truthfully using the same designation. It is only when the adoption or imitation of what is claimed to be a trade mark amounts to a false representation, express or implied, designed or incidental, that there is any title to relief against it. True it may be that the use by a second producer, in

describing truthfully his product by a name or combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but if it is just as true in its application to his goods as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth."

Now Swedish snuff may signify (1) an article made in Sweden, or (2) made by a native of Sweden, or (3) having the same ingredients and proportions as snuff made there. If the first, appellant can not complain, as he admits that he makes his goods in Chicago; any representation to the contrary would be false and could never acquire any right to equitable protection. If the second or third, appellee can use the words as truthfully as appellant, both being natives of Sweden, and there being no evidence that appellee's snuffs have not the same ingredients and proportions as those made in Sweden.

That terms in common use to designate a trade or occupation, in connection with other words indicating that a particular class of merchandise is specially dealt in, can not be exclusively appropriated by any one as a trade mark or name, is decided in *Choynski v. Cohen*, 39 Cal. 501. There the plaintiff had adopted as the name of his store the words, "Antiquarian Bookstore," and the defendant set up a rival place under the name of "Antiquarian Book and Variety Store." It was held that "book store" could no more be exclusively appropriated as a trade mark than "tinner's shop," "drug store" or "hotel;" that plaintiff's right depended on the word "Antiquarian," which meant no more than that the proprietor dealt in a certain class of books, to wit, ancient books, or books relating to antiquity; that the word was simply to indicate the class of books sold there, in the same sense that the words, "Law Book Store" or "Medical Book Store," or "Divinity Book Store" would indicate that law, medical or religious works were for sale. The court said the plaintiff could no more appropriate the words to which he set up the

exclusive right, than a shoe merchant could the words, "Ladies' Shoe Store."

These authorities we regard as conclusive against Bolander's bill. The name he has chosen is either misleading as to the character of his goods, or it is merely descriptive, and so not within any recognized rule which guards against its use by others.

The decree is affirmed.

Decree affirmed.

35	560
139	345

VLADIMIR CERVENÝ

v.

THE CHICAGO DAILY NEWS COMPANY.

Libel—Imputation of Holding Certain Opinions.

The imputation that one holds certain opinions is not libelous.

[Opinion filed April 21, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Messrs. JONES & LUSK, for appellant.

Mr. JOHN J. KNICKERBOCKER, for appellee.

GARY, P. J. The Circuit Court sustained a demurrer to the declaration of the appellant, and entered final judgment for the appellee. The action is for publishing that "Cervený is an anarchist, hot headed and fiery." And the declaration, after setting out a history of events, which may be found narrated in *Spies v. People*, 122 Ill. 1, and the execution of the sentence as to part of the convicted persons, avers that calling the appellant an anarchist, meant that he "was a person who entertained opinions and doctrines opposed to the

maintenance of law and order, and subversive of government, and in favor of the overthrow of society as then existing, by revolution and force." No actual or special damage is alleged.

The difficulty that is met on the threshold of this case, is that if it be libelous to impute to any one the holding of opinions, with whatever historical preface as to misconduct of persons holding the same opinions, there is scarcely a sect or party in religion or politics, in the old world or the new, that a plaintiff may not be at liberty to bring before a jury, for a condemnation or approval of its opinions. There is no precedent for such an action. It is true that definitions by judges and text writers seem to be authority for it, but they are supported by no adjudged cases. The nearest that have been found are: *Stow v. Converse*, 3 Conn. 325; and *Giles v. State*, 6 Ga. 276. In the first of these cases the libel was that the plaintiff, in a constitutional convention of the State of Connecticut, "Openly avowed the opinion that the government had no more right to provide by law for the support of the worship of the Supreme Being than for the support of the worship of the devil." And the court say "a sentiment so irreverent toward the Creator and Governor of the world, and so analogous to the modes of thinking habitual to unbelievers and profligate men, would disgrace any person who was not a professed infidel." There is more of the opinion in the same strain which seems to make the sting of the libel consist in imputing opinion to the plaintiff. But the libel in fact charged not opinion but an act—speech in a deliberative assembly—upon the plaintiff, so that whatever might be the authority in Illinois in 1890, of a Connecticut case touching religious opinions, decided in 1820, it is not in fact applicable to a case where opinions only are imputed.

In the Georgia case the construction placed upon the words is shown by this language of Judge Lumpkin: "But the enormity of this libel stops not here. As if to involve its victim in the lowest depths of infamy and disgrace, he is accused not only of being a tory in the war of the Revolution

but with having been punished in the most ignominious manner for the robberies which he then committed.

“When the name of Washington shall grow old and cold to the ear of the patriot; when it shall be synonymous with that of Arnold; when the poles of the earth shall be swung ninety degrees to a coincidence with the equator, then, and not before, will it cease to be a libel to call a man ‘a plundering tory of the Revolution.’” This decision was made in 1848.

I know not which most to admire; the eloquence of Judge Lumpkin, or the patriarchal longevity of the Georgians, which made them susceptible to injury after two-thirds of a century had passed since the surrender of Cornwallis, by imputations upon their conduct during the war of the Revolution. But leaving that doubt unsettled, the case is no authority for this one.

The demurrer was rightly sustained and the judgment is affirmed.

Judgment affirmed.

35 502
46 395

WILLIAM F. HAIR

V.

NELS JOHNSON.

Master and Servant—Wages—Written Contract—Mistake—Reformation.

1. When parties put their agreements in writing it becomes the exclusive means of proving what they have agreed to, unless it can be shown that there was a mistake in the writing by inserting or omitting words or clauses. The words of the writing being such as the parties agreed upon, neither party can claim that they do not mean what he supposed, even as a defense.

2. Upon a bill filed for the purpose of obtaining a certain share of the profits arising out of the construction of a viaduct in conformity with a certain contract in writing, the defendant contending that said contract contained a mistake, and praying that the same be reformed, this court declines, in view of the evidence, to interfere with the decree denying such request.

Hair v. Johnson.

[Opinion filed April 21, 1890.]

IN ERROR to the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

MR. JOHN N. JEMISON, for plaintiff in error.

MR. GEORGE F. BLANKE, for defendant in error.

GARY, P. J. Hair had a contract with the city of Chicago for building a viaduct over Kinzie street at Ashland avenue. Whether it was for gross price for the whole work, or separate price for different parts, and what was included, whether only retaining walls and filling, or superstructure and paving, this record does not show.

These parties then made a contract under seal that Johnson would for Hair, "superintend, manage and take entire charge of the masonry work of such viaduct, which shall include the building of curb walls, piers and abutments, digging of ditches and the procuring of masons and laborers for the doing of such work, but at the charge of said Hair." Hair agreed to "furnish all material, do the filling, and furnish moneys" "so as to cause no delay."

"Johnson, in payment of his services hereunder, shall receive forty (40) per centum of the net profits the contract for the construction of such viaduct may yield; but in the event of no profits then said Johnson shall have no claim for services against said Hair."

There was a further provision that Johnson should at all times be entitled to full information for the purpose of ascertaining the amount of profits.

The work being done and Johnson having performed his part, he filed the original bill in this case, on which no question now arises for his share of the profits of building the viaduct.

Hair, by his answer, alleged a mistake in the contract; that Johnson was to have had forty per centum of the profits on that portion only of the work which he superintended, and

also filed his cross-bill for a reformation of the contract, alleging the same mistake. This cross-bill the Superior Court dismissed on a hearing of the evidence, and from the decree so dismissing it, this appeal is taken.

There is considerable evidence which is consistent with the allegation of the appellant that the parties agreed that the compensation for the appellee was to be forty per centum of the profits of only that part of the work which he superintended. It appeared that there was a separate price for such part fixed either by the contract with the city, or by the parties themselves, but as that does not appear, most of such evidence, consisting of testimony as to declarations made by the appellee, is consistent with the theory that when he stated that he had no interest in anything but the work he superintended, he referred only to his personal superintendence. In any possible view of the case he had an interest in the cost of the other part of the work. If a separate price had been fixed for the portion he superintended, then his interest was to have as much of the cost of the whole work go into the account of the other parts, and as little upon his part as possible.

On the other hand if no separate price was fixed, and the profits of the whole work were to be apportioned to the respective parts in the ratio of their cost, his interest was the other way. It is quite unnecessary to consider the evidence in detail.

"When parties put their agreements in writing, it becomes the exclusive means of proving what they have agreed to, unless it can be shown that there was a mistake in the writing by inserting or omitting words and clauses. The words of the writing being such as the parties agreed upon, neither party can claim that such words do not mean what he supposed, even as defense. To vary or avoid such writing "all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before or after, or at the time of the completion of the contract, will be rejected." 2 Taylor's Ev. 964.

The evidence shows that the agreement in this case was written in duplicate. After it was written, the writer of it

Heffron v. Chapin & Gore.

read one copy aloud and slowly, the appellant holding the other to follow the reading. He does not claim that he was under any mistake as to what the writing said. He is bound by it. *Oswald v. Sproehnle*, 16 Ill. App. 368, and many cases there cited.

There is no error and the decree is affirmed.

Decree affirmed.

PATRICK H. HEFFRON

v.

CHAPIN & GORE.

Negotiable Instrument—Note—Set-off—Evidence.

1. While the giving of a note, of itself, unexplained, is not evidence of a settlement of all accounts between the parties, it tends to corroborate testimony of such settlement.

2. In connection with other circumstances, without any direct testimony of a settlement, the giving of a note may be evidence of the existence of a demand, subject to no counter-claim.

[Opinion filed April 21, 1890.]

IN ERROR to the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

Messrs. OSBORNE BROS. & BURGETT, for plaintiff in error.

Mr. C. H. REMY, for defendants in error.

GARY, P. J. The Chapin & Gore Company sued Heffron upon a promissory note. He claimed a set-off of \$2,000, originating, as he testified, in an exchange of checks in May and June, 1888.

The note was given the following September, and in November, he gave them checks for \$10,000, one of which

was for \$2,000. He could not remember with what individual of the several persons authorized to do business for Chapin & Gore, he made the exchange. They were severally called as witnesses, and had no recollection of the transactions. His notice of set-off claimed \$6,700, but was accompanied by no bill of particulars, and as far as the record shows, he never made any claim for the \$2,000 until he testified on the trial in January, 1890. This is not a case of conflicting evidence, but of uncertain evidence, the probability or improbability of which is to be determined by considering it in connection with all the circumstances.

While the giving of a note, of itself, unexplained, is not evidence of a settlement of all accounts between the parties, it tends to corroborate testimony of such a settlement. *Rosenkrantz v. Mason*, 85 Ill. 262.

In connection with other circumstances, without any direct testimony of such a settlement, the giving of a note may be evidence of the existence of a demand, subject to no counterclaim. The question was one of fact, on which the finding of the court has the force and effect of the verdict of a jury. *Lennon v. Goodspeed*, 38 Ill. 438.

The judgment is affirmed.

Judgment affirmed.

35 566
e115 2411

JOEL H. NORTON

v.

FREDERICK COGGSWELL.

Appeals—Practice—Costs.

1. Where an appeal is taken by filing the bond with the clerk of the court appealed to, the appellee must be summoned, or appear, or two *nihil* be returned, before the court can proceed, and if one of two or more defendants, against whom judgment has been entered, appeals, there must be summons to those not appearing, and without a transcript on file the court can not proceed.

2. Where the error is shown by the record, no bill of exceptions is necessary to present it herein.

Norton v. Coggsawell.

[Opinion filed April 21, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

MR. G. FRANK WHITE, for appellant.

No appearance for appellee.

GARY, P. J. The record in this case shows that May 12, 1888, the appellant filed in the office of the clerk of the Superior Court, a bond by which he appealed from a judgment of a justice of the peace, recited therein to have been rendered against him and one M. J. McDowld a week before, in favor of the appellee here. No further steps, before final judgment, were taken in the case; no summons to, or appearance by, either McDowld or the appellee, and no transcript or papers from the justice, filed.

October 31, 1889, the court called the case for trial; neither party appeared; the court dismissed the appeal, and rendered judgment for costs, in favor of the appellee against the appellant. This was irregular, unless it can be maintained that the court may, of its own impulse, do what, at the request of the party in whose favor it acts, it would have no right to do. Where an appeal is taken by filing the bond with the clerk of the court appealed to, the appellee must be summoned, or appear, or two *nihils* be returned, before the court can proceed. And if one of two or more defendants against whom judgment has been entered, appeals, there must be summons to those not appearing. And without a transcript on file, the court can not proceed.

To cite the many cases to these several propositions, would be ostentatious. A few of the later ones, containing references to earlier ones, and to the statutes, are Howard v. Castello, 31 Ill. App. 611; Bessey v. Ruhland, 33 Ill. App. 73; Ogden v. Danz, 22 Ill. App. 544. Among the early ones are Hooper v. Smith, 19 Ill. 53; McCormick v. Fulton, Ibid. 570. The error is shown by the record, and needs no bill of excep-

tions to present it here. *Wiggins v. People*, 101 Ill. 446; *Randolph v. Emerick*, 13 Ill. 344.

This may be a very hard case for the appellee. He did not appear in the Superior Court; he does not appear here. For all that this record shows he may be ignorant that any appeal was taken from the judgment of the justice. An erroneous judgment, ostensibly in his favor, was entered in the Superior Court, which he did not ask for, and if he had had any choice in the matter, perhaps would not have accepted. He may be ignorant of that, and of this appeal from it. But the statute gives the appellant the right to this appeal, and makes it the duty of the appellee to follow it here without proof of any notice. And finding such error as requires the reversal of the judgment, the statute compels this court to saddle the costs of this appeal upon the appellee, whether he be blameworthy or not.

Reversed and remanded.

JAMES H. GRAHAM

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Contempt—Election Law—Statute—Constitutionality of—Jurisdiction.

This court has no jurisdiction to review any matters involved in a given controversy, where the constitutionality of a statute is involved.

[Opinion filed April 21, 1890.]

IN ERROR to the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

Messrs. MURPHY & CUMMINGS, for plaintiff in error.

Messrs. JOEL M. LONGENECKER and SMITH & HARLAN, for defendants in error.

Graham v. The People.

MORAN, J. This writ of error brings to this court for review, the judgment of the County Court in a contempt proceeding against plaintiff in error, prosecuted under the provisions of the general election law of this State, which provides that judges or clerks of election appointed by the election commissioners under the terms of said law, shall be liable in a proceeding for contempt for any misbehavior in their office, to be tried in open court on oral testimony in a summary way without formal pleadings, etc.

Many objections are taken by counsel for plaintiff in error against the course of the County Court in the proceeding in which the conviction for contempt was had, and among the errors assigned is the one that the statute under which this contempt proceeding was brought, is unconstitutional.

Since the decision of the Supreme Court in the case of *Puterbaugh v. Smith*, 23 N. W. Rep. 428, counsel may have good ground for maintaining this position, but the raising of such a question ousts this court of jurisdiction to decide that or any other question arising on the record. The case involves the validity of the statute, and is therefore reviewable only in the Supreme Court.

The case of *Williams v. The People*, 20 Ill. App. 92, and 118 Ill. 444, shows that where the validity of the statute is involved this court may not take jurisdiction by passing by that question and deciding the case on the other points raised.

If the constitutionality of a statute is involved, we have no jurisdiction to review the proceeding as to any matters involved in the controversy.

The writ of error in this case must therefore be dismissed.

Writ of error dismissed.

35- 570
52 349

ELIZABETH LOVETT

V.

CITY OF CHICAGO.

Personal Injuries—Damages—Inadequacy—Municipal Corporations.

1. The refusal of a new trial to the plaintiff in a suit brought against a municipality to recover for personal injuries alleged to have occurred through its negligence, upon the ground that the verdict in his favor was inadequate, will not be disturbed merely on the strength of such inconsistency.

2. An instruction in such case setting forth that if the defendant was found guilty, they should assess against it such damages as they believed from the evidence the plaintiff sustained as the *direct* result of such negligence, can not be complained of. The word *direct* is synonymous with the words "natural and proximate," more commonly used.

[Opinion filed April 21, 1890.]

IN ERROR to the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Messrs. W. H. Sisson, C. F. GOODING, and W. D. COPPERNOLL, for the plaintiff in error.

Messrs. W. E. HUGHES, GEORGE F. SUGG and C. S. CAMERON, for defendant in error.

GARNETT, J. In this action on the case for personal injuries to appellant, the jury, by their verdict, allowed her \$100 damages. The evidence would have warranted a much larger verdict, and appellant now asks that the judgment may be reversed because the damages given were inadequate.

The verdict is inconsistent, but the trial judge evidently thought the plaintiff had been awarded \$100 more than she was entitled to on the merits of the case. Otherwise he would have granted her motion for a new trial. This court has decided that in such cases the refusal of a new trial will

Waixel v. Harrison.

not be disturbed merely on the strength of the inconsistency of the verdict. *O'Malley v. Chicago City Railway Co.*, 33 Ill. App. 354.

As to the measure of damages the circuit judge of his own motion instructed the jury that if they found the defendant guilty they should assess against it such damages as they believed from the evidence the plaintiff sustained as the *direct* result of defendant's negligence. Appellant objects to the word *direct* in the instruction, and says the small amount of the verdict was caused by the use of that word. The words "natural and proximate" are more commonly used than "direct" and for that reason may be said to be more appropriate. But the word "direct" is often used in the decided cases as synonymous with those in more general use. *I. B. & W. R. Co. v. Burney*, 71 Ill. 381; *Slater v. Rink*, 18 Ill. 527; *Walrath v. Redfield*, 11 Barb. 368; *Clemens v. Hannibal & St. J. R. R. Co.*, 53 Mo. 366; *Salem Bank v. Gloucester Bank*, 17 Mass. 32.

We are not prepared to say that the instruction was erroneous.

The judgment is affirmed.

Judgment affirmed.

SOLOMON WAIXEL, BY NEXT FRIEND,

v.

CARTER H. HARRISON.

Appeals—Practice—Assignment of Errors—Absence of.

This court declines to consider the appeal in the case presented, there being no assignment of errors.

[Opinion filed April 21, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

35	571
43	364
43	380
44	294
44	295
35	571
50	466

Messrs. BYAM, PARKHURST & WEINSCHENK, for appellant.

Messrs. A. S. TRUDE and W. A. FOSTER, for appellee.

GARY, P. J. There is no assignment of errors in this case. In the abstract, the motion for a new trial, with a reference to the place in the record where it is to be found, is printed under the title "Assignment of Errors." But it is no such thing.

The appeal must be dismissed, without prejudice, or costs to either party. *Ditch v. Sennott*, 116 Ill. 222.

Appeal dismissed.

35	572
44	328
35	572
107	1221

HANNAH M. REID

V.

JAMES CISLER AND JOSEPH SERSON.

Appeals—Affidavit of Merits—Filing of.

1. On appeal from the judgment of a justice, the defendant is not required to file an affidavit of merits in the higher court until the cause is reached for trial.

2. The statute makes no distinction in this respect between an appeal perfected by entering into bond before the clerk of the Circuit or Superior Court, and one where the bond is approved by the justice.

[Opinion filed April 21, 1890.]

IN ERROR to the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. DOOLITTLE, McKEY & TOLMAN, for plaintiff in error.

Messrs. KRAFT, CROSS & COLLINS, for defendants in error.

Barton v. The People.

GARNETT, J. *Martin v. Hochstadter*, 27 Ill. App. 166, decides that on appeal from a judgment of a justice of the peace to the Circuit Court, the defendant is not required to file an affidavit of merits until the cause is reached for trial. The ruling was affirmed in *World's Soap Mfg. Co. v. Woltz*, 27 Ill. App. 202, and again in *Jensen v. Fricke*, 35 Ill. App. 23.

No reason is perceived for withdrawing what has been heretofore said on the point. The statute makes no distinction, in this respect, between an appeal perfected by entering into bond before the clerk of the Circuit or Superior Court and one where the bond is approved by a justice. The judgment in this case, and the order denying the motion to set it aside, conflict with *Martin v. Hochstadter*, and are therefore reversed and the cause remanded.

Reversed and remanded.

WILLIAM H. BARTON

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Criminal Law—Obtaining Goods under False Pretenses—Cheating—Check—Absence of Funds.

1. The fact, that a check is postdated or payable at a future day, does not take a given case out of the statute touching the obtaining of goods under false pretenses, nor does a merely colorable deposit shield the culprit.

2. The giving of a check is not a representation that the maker has the money in the bank upon which it is drawn, but it is a representation that the check is a good and valid order for its amount; that the existing state of facts is such that in ordinary course the check will be met.

3. Both court and jury will take notice of general business usages.

[Opinion filed April 21, 1890.]

IN ERROR to the Criminal Court of Cook County; the Hon.
OLIVER H. HORTON, Judge, presiding.

Mr. C. STUART BEATTIE, for plaintiff in error.

Mr. J. M. LONGENECKER, for defendant in error.

GARY, P. J. The plaintiff in error was convicted in the Criminal Court, upon an indictment, the second count of which charges, with a good deal of surplusage, that on February 2, 1889, he obtained from one Pape, a driver in the service of the H. C. Staver Manufacturing Company, a buggy of the value of \$160, and two robes of the value of \$15, the property of the company, by falsely pretending to Pape that a check drawn by himself upon a bank in Chicago, and dated two days later, for \$175, was a good and available order for the payment of \$175 and of the value of \$175.

The indictment is sufficient, if the evidence warrants the conviction. The record shows that February 2, 1889, was Saturday; that about the middle of the day Barton, at the salesroom of the company, bargained with them for the buggy and robes, and said: "I don't want any credit, you send the buggy and robes to the place; don't send them before four o'clock; I am going to bank, and by that time I will have the money to pay the man who delivers the buggy and robes."

Barton had a stable, to which about five o'clock in the afternoon Pape took the buggy and robes; Barton met him and directed about the delivery. Pape went into the office, handed Barton the bill for \$175, and Barton made out and delivered to Pape the check. Barton had in fact an account at the bank, on which the largest balance to his credit shown by the record at any time was less than \$4. His manner of doing business had been to make deposits, the largest of which was \$7, and draw small checks to be paid by the bank. He also drew larger checks, from \$16 to \$40, for which he left with the bank, money to pay them when presented, without having either money or checks pass through his account. There is nothing in the case to indicate that he had the slightest reason to expect that as his account stood when he gave the check, the bank would pay it. On the trial it was expressly admitted on his behalf that when he gave it he knew it was not good.

Barton v. The People.

It is apparent that his design was to cheat the company out of the buggy and robes, and the only question is whether his ingenuity has been sufficient to devise a scheme within the spirit, but not the letter, of the statute. "Whoever, with intent to cheat another, designedly, by color of any false pretense, obtains from any person any personal property," are the words of the statute applicable to this case. By statute, person includes corporations. It has been the law of England for nearly four score years that "fraudulently to obtain goods by giving in payment a *cheque* upon the banker with whom the party keeps no cash, and which he knows will not be paid," is an offense indictable under a statute substantially like that of this State. *Rex v. Jackson*, 3 Camp. 370.

The fact that the check is postdated or payable at a future day has often been held not to take the case out of the statute. *Rex v. Parker*, 7 C. & P. 825; *Foot v. People*, 17 Hun, 218. Nor does a merely colorable deposit shield the culprit. *Queen v. Hazelton*, 2 L. R. C. U. 134. Giving a check is not a representation that the party has then the money in the bank to his credit, but it is a representation that the check is a good and valid order for its amount; that the existing state of facts is such that in ordinary course the check will be met; case last cited. The postdate of the check is a perfectly immaterial circumstance in this case.

Both court and jury will take notice of general business usages. A check given at 5 p. m. Saturday, dated Monday, can be presented for payment just as soon as if dated Saturday. The representation as to its value, and the existing state of facts, by giving it, is just as emphatic with the one date as the other. Courts are under no duty to aid the devices of dishonesty by refining away the substance of criminal acts.

The judgment is affirmed.

Judgment affirmed.

35 576
43 654

MAGGIE SCHREINER, FOR USE, ETC.,

v.

THE HIGH COURT OF ILLINOIS CATHOLIC ORDER OF
FORESTERS.

Life Insurance—Killing of Assured by Beneficiary—Endowment Certificate—Conditions—Pleading.

1. A contract of insurance impliedly assumes the risk of all carelessness by every person, whether a possible beneficiary under the contract or not, from which the death of the assured may result, unless such acts of carelessness are especially excepted; and a death which is unintentional, though caused by some neglect or unlawful act of the beneficiary, is within the contract and should not defeat the policy.

2. There can be no recovery in an action founded upon an intentional wrong. The beneficiary in an insurance policy can not recover where the death of assured has been intentionally caused by his act.

3. It is not necessary to show in a given case that the purpose of the beneficiary in murdering the assured was to obtain the amount at risk; it is enough if the killing was the intentional and wrongful act of the beneficiary named in the policy.

4. It is not necessary to find in the policy an exception in terms against the intentional killing of the assured by the beneficiary. Such exception is implied by law.

5. In an action brought to recover upon an endowment certificate of a mutual benefit association, this court holds, that the plea setting up the record of the Criminal Court, showing the indictment of the beneficiary therein for the murder of assured, her plea of guilt of manslaughter, and sentence to the penitentiary, constituted no defense to said action, and that judgment for the defendant can not stand.

[Opinion filed April 21, 1890.]

IN ERROR to the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. ALBION CATE, for plaintiff in error.

The liability has become fixed. The mere fact that the holder of the note causes the death is not a valid defense. Defendant has given its bond to Matthew Schreiner to pay

plaintiff. The consideration is a good one. It is not against good morals or public policy. Had any other person than plaintiff been the appointee, the question could not have arisen.

The distinction between defendant's contention and the case at bar is clear. The contracting for *future* illicit intercourse would be a case within the maxim and rule invoked. Past illicit intercourse would be a good consideration. So an agreement to engage in smuggling, or to deal in differences on the stock or produce exchange are illustrations of *ex turpi causa oritur nulla actio inter partes*, as are also *Liness v. Hesing*, 44 Ill. 113; *Tenny v. Foote*, 95 Ill. 99; *Arter v. Byington*, 44 Ill. 468; *Henderson v. Palmer*, 71 Ill. 579; *Parsons v. Ely*, 45 Ill. 232; *Skeels v. Phillips*, 54 Ill. 309; *Neustadt v. Hall*, 58 Ill. 172; *Jerome v. Bigelow*, 66 Ill. 452; *Gillett v. Logan Co.*, 67 Ill. 256; *Hamilton v. Hamilton*, 89 Ill. 349; *Pearson v. Lee*, 1 Scam. 193; *Nash v. Monheimer*, 20 Ill. 215; *Loyd v. Malone*, 23 Ill. 43; *Ambrose v. Root*, 11 Ill. 497; *Ferguson v. Sutphen*, 3 Gilm. 547.

Nor can an insurance company avoid its contract by setting up an infraction of the "Ten Commandments," the "Illinois Criminal Code," or a violation of the precepts of the "Sermon on the Mount." *P. Ins. Co. v. Mitchell*, 67 Ill. 43.

MR. FRANCIS T. COLBY, for defendant in error.

An insurance company assumes certain risks in issuing a policy, but it is always implied that it does not assume the risk of the wilful act of the payee to bring about the event insured against. So the insured can not recover for loss by fire caused by his arson. *Scott v. Home*, 1 Dillon (C. Ct. U. S.), 105; *McConnell v. Delaware Ins. Co.*, 18 Ill. 228; *Howell v. Hartford, etc., Ins. Co.*, 3 Ins. L. J. 653; *Sibley v. St. Paul Ins. Co.*, 8 Ins. L. J. 461; *Franklin Ins. Co. v. Humphreys*, 65 Ind. 549.

The contract of life insurance is with the payee (*Glanz v. Gloeckler*, 104 Ill. 573); so if the life upon which the policy is granted be taken by the person who would otherwise receive the insurance money, insurers are discharged, and the money

can not be recovered of them. Porter on Insurance, p. *131; Prince of Wales Ins. Co. v. Palmer, 25 Beav. 605; New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. Rep. 591 (reversing 20 Blatch. (U. S.), 493).

It has been held that the insurer may take a risk of death by any cause other than by sentence of law, self-destruction in a sane mind, or in consequence of some criminal violation of law. If death ensue from any of these causes the insurer is not liable, since it is contrary to the policy of the law, in such case, to allow the insurance money to be recovered. Porter on Insurance, *p. 129; Hatch, Adm'r, etc., v. Mutual Life Ins. Co., 120 Mass. 550; Amicable Soc., etc., v. Bolland, 4 Bligh, N. S., 194; Horn v. Anglo-Australian, etc., L. J. 511, Ch.

It is contrary to public policy to permit a person who wilfully kills another to enforce through the courts the contract for the payment of insurance upon the life of the person killed. New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. Rep. 591; Riggs v. Palmer (N. Y. Ct. of Appeals, Oct. 8, 1889), 22 N. E. Rep. 188; Greenwood on Public Policy, part I, rule. II.

No action could arise except by the death of Matthew Schreiner. That was brought about by a crime. The criminal ought not to be assisted by the courts to reap a reward from her crime. The maxim "*ex maleficio non oritur contractus*," applies. Broom's Legal Maxims, 706.

MORAN, J. The declaration in this case counts upon an endowment certificate issued to one Matthew Schreiner by the High Court of Illinois Catholic Order of Foresters, in and by which, on condition that said member (Matthew Schreiner) complies with the laws, rules and regulations governing the said order, said High Court promises to pay to his wife, Maggie Schreiner, \$1,000, upon satisfactory evidence of the death of said member, provided that said member is in good standing in the order at the time of his death, "and provided also that this certificate shall not have been surrendered by said member and another certificate issued at his request, in accordance with the laws of this order."

The certificate is shown to be duly assigned to the beneficial plaintiff, John C. King.

To the declaration defendant filed pleas, to some of which plaintiff demurred, which demurrers the court overruled, and plaintiff electing to stand by the demurrers, the defendant withdrew all other pleas, and there was judgment for defendant on the pleas demurred to. These pleas are four in number. The first alleges, as the ground of defense, that said Maggie Schreiner did "feloniously kill the said Matthew Schreiner;" the second avers that no cause of action could arise upon said certificates except by reason of the death of said Matthew Schreiner, and that "said death of said Matthew Schreiner was caused by the felonious act of the said Maggie Schreiner," etc., and the third is like the second, except it alleges that the death of Matthew "was caused solely by the wilful act of the said Maggie Schreiner," and that said wilful act in causing the death of the said Matthew Schreiner was at the time of the commission thereof contrary to the statute of the State of Illinois. The fourth plea sets up the record of the Criminal Court of Cook County, showing the indictment of one Lena Schreiner for the murder of said Mathias Schreiner, her plea of guilty of manslaughter, and her sentence to ten years in the penitentiary, and alleges that the Maggie Schreiner named in the benefit certificate is the same person as the Lena Schreiner mentioned in the indictment and judgment, and that the Mathias Schreiner mentioned in the certificate is the Matthew Schreiner mentioned in the indictment; and avers that said judgment of the Criminal Court is still in full force, and prays judgment, etc.

This fourth plea may be very readily disposed of. Indeed, it is somewhat difficult to surmise on what theory it is supposed to set up matter in bar of the action. The record is merely evidence of the conviction, but is no evidence of anything that is to be inferred or argued from it. It constitutes no estoppel except between the people and the person convicted, and is not evidence when the question arises collaterally even of the fact of Mathias Schreiner's death, much less of the fact of who killed him. Her plea admitting guilt of

manslaughter is like any other admission of the kind, not conclusive, but subject to contradiction or explanation, when proved against her in any civil proceeding, and in such a proceeding the record is not evidence in favor of a party adverse to her, that she did so plead guilty. The plea constituted no defense whatever to the action. *Duchess of Kingston's case* and notes thereto, 2 Smith's L. C. 609.

The other pleas do not, in our opinion, set up such a killing as should in law bar plaintiff from a recovery. The allegations that the death was caused solely by the wilful act and by the felonious act of said Maggie Schreiner, and that she did feloniously kill said Mathias Schreiner, would all be supported by proof of facts which would constitute the crime of involuntary manslaughter under our statute.

"Involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner." *Crim. Code*, Sec. 145.

Such an involuntary killing might be punishable, and it would therefore be felonious, and it might also be the result of a felonious act, or of a wilful act. No homicide which is the result of carelessness, or which is not an intentional killing, should bar plaintiff's rights to the money on her certificate.

A contract of insurance or a certificate like the one in suit, impliedly assumes the risk of all carelessness by every person, whether a possible beneficiary under the contract or not, from which the death of the insured may result, unless such acts of carelessness are especially excepted; therefore a death which is unintentional, though caused by some neglect or unlawful act of the beneficiary, is within the contract, and ought not to defeat the policy. But it would be unjust and unreasonable to hold that the intentional taking of the life of insured, by the person who is to receive the insurance on the death, is a risk assumed and insured against by the company or the society which issues the policy or certificate.

The law enters into, and becomes a part of every contract,

and furnishes the rule for its proper construction. Public policy is a law with reference to which all contracts must be made and interpreted, and public policy forbids that contracts shall receive such an interpretation as will encourage crime or make their performance a reward thereof. Wager policies were held void at common law because of the obvious temptation presented by such policies to the commission of crime. Quite as clear, and it would seem a more imperative policy, requires the rule to be that a beneficiary in a life policy can not recover, when the event by which he is to benefit, to wit, the death of the insured, has been intentionally accomplished by his own act. To hold otherwise would be to furnish to the party interested the strongest temptation to bring about, if possible, the event insured against. It is wholly unnecessary to find in the policy or the certificate an exception in terms against the intentional killing of the insured by the beneficiary. Such an exception is introduced into the contract by the law, which, by civil power and coercion, seeks to enforce the divine command, "Thou shalt not kill."

No court will lend its aid to one who founds his cause of action on his intentional wrong. If this contract read in terms that the High Court would pay the money to plaintiff on the death of Schreiner, whether he should die from natural causes, or by the hands of plaintiff, all would agree that it would be void as against public policy. Is it not plain that the same policy which would render it void if expressed in terms, forbids an interpretation of its obligations, which would give to the contract the same injurious and immoral operation. The question sought to be raised by the pleas in this case, but which as we have seen they fail to present, is new, and we have found no case exactly in point. It was held by the Supreme Court of the United States in *Insurance Company v. Armstrong*, 117 U. S. 599, that a person who procured a policy upon the life of another, payable at his death, and then murdered the assured to make the policy payable, could not recover thereon. It would, indeed, as was there said, "be a reproach to the jurisprudence of the country," if this were not so. We do not think, however, that it is neces-

sary to show that the *purpose* of the killing was in order to get the money. It is enough that the killing was the intentional and wrongful act of the beneficiary named in the policy.

Then, as a fair interpretation of the contract, the death is occasioned by a cause which exempts the insurer from liability. This avoids the view that the beneficiary is denied the right to recover as an additional punishment to that prescribed by law for the offense. There is no attempt to enhance the pains and penalties provided by law for the punishment of crime, nor is it said to the plaintiff, "you are a criminal and can have no aid from the court to enforce legal rights arising to you under a contract."

Simply no right has accrued to her under the contract if she intentionally killed the assured.

For overruling the demurrers to the insufficient pleas, the judgment must be reversed and the cause remanded.

Reversed and remanded.

35	582
144s	490
35	582
54	368
35	582
60	346

THE NIAGARA FIRE INSURANCE COMPANY

V.

ARIANA E. SCAMMON, ADM'X.

Fire Insurance—Stipulation—Conditions—Alienation—Practice—Interlocutory Orders by Several Judges—Account.

1. When an interlocutory order has been made in a given case by one judge, and further proceedings are had therein before another judge in the same county, each judge may conduct the proceedings before himself in accordance with his own opinion at the time, whether it conflicts with an earlier interlocutory order or not, and it is immaterial whether that earlier order was made by himself or another judge.

2. A stipulation setting forth that one case shall "abide by the issue," of another, means that it shall abide "the ultimate result or end," of such other.

3. In an action brought to recover upon a fire insurance policy, the plaintiff having moved for judgment upon a certain stipulation duly entered into, the defendants contending that it was not liable because of a certain alienation of the property insured, this court declines to interfere with the judgment for the plaintiff.

[Opinion filed April 21, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Mr. HENRY G. MILLER, for appellant.

MESSRS. CHARLES F. WHITE and MARTIN L. WHEELER, for appellee.

GARY, P. J. When this appeal was docketed in this court, Jonathan Young Scammon, of whose estate the appellee is administratrix, was yet alive. More than fifty years earlier, and while the circuit judges whose names appear in this record were yet unborn, he had been appointed reporter of the decisions of the Supreme Court of the State, and four volumes bearing his name are witnesses of the fidelity with which he performed the labor he undertook, and of the ability of the early judges of that court during a period of eleven years.

At the September term, 1889, of the Circuit Court, this case was submitted to the court for trial, without a jury, before Judge Clifford. The plaintiff there, now represented by the appellee, moved for judgment upon a stipulation made, as the parties, by their briefs, agree, though the record does not show the date, at the April term, 1886, of the Circuit Court, as follows:

“Circuit Court, Cook County.

J. Young Scammon	}	Gen. No.
v.		Term No. 17.
The Commercial Union Assurance Company.		

Same	}	Gen. No.
v.		Term No. 18.
The Adriatic Fire Insurance Company.		

Same v. The Shoe and Leather Insurance Company.	}	Gen. No. Term No. 19.
Same v. Same.	}	Gen. No. Term No. 20.
Same v. The Commercial Union Assurance Company.	}	Gen. No. Term No. 23.
Same v. The Adriatic Fire Insurance Company.	}	Gen. No. Term No. 24.
Same v. The Firemen's Fund Insurance Company.	}	Gen. No. Term No. 22.
Same v. The Commercial Union Assurance Company.	}	Gen. No. Term No. 25.
Same v. The Shoe and Leather Insurance Company.	}	Gen. No. Term No. 26.
Same v. The Adriatic Fire Insurance Company.	}	Gen. No. Term No. 27.

It is hereby stipulated that the above cases shall be tried by the court without the intervention of a jury, and that the

Niagara Fire Ins. Co. v. Scammon.

first tried shall be that of J. Young Scammon v. The Commercial Union Assurance Company, Term No. 17, and that either party shall be at liberty to use the evidence contained in the bill of exceptions made up from the former trial of said case, and filed in said Circuit Court, December 22, 1880, and now in the hands of the plaintiff's attorneys, or from the abstract of the record of said case filed in the Appellate Court of the First District, if for any reason the bill of exceptions is not in the possession of the party offering such evidence.

It is further stipulated that the succeeding cases shall abide the event of said case both in the Circuit Court and on appeal to the Appellate Court and Supreme Court, if any appeal shall be taken by either party. It is understood that this stipulation shall embrace all the cases in the Circuit Court in which J. Young Scammon appears as plaintiff in his own behalf, or as executor against insurance companies, represented by Miller, Lewis & Judson as defendants. It is understood that either party may offer additional testimony.

(Signed) CHARLES F. WHITE,
Att'y for plaintiff.
MILLER, LEWIS & JUDSON,
Att'ys for defendants.

It is hereby understood and agreed by and between the respective attorneys in the case of Scammon v. The Niagara Fire Insurance Company (No. 21), that it shall abide by the issue in the case of Scammon v. The Commercial Union Assurance Company, above named.

CHARLES F. WHITE,
Att'y for plaintiff.
LAWRENCE PROUDFOOT,
Att'y for defendant.

The same motion for judgment upon the stipulation having been made before Judge Grinnell, and denied by him at the preceding April term, it was also denied by Judge Clifford, and as the brief for appellant says, though the record does not so show, for the reason that Judge Grinnell had denied it.

In the Circuit and Superior Courts of Cook County, each

having several judges, when any interlocutory order has been made in a case by one judge, and further proceedings therein are before another, while courtesy to each should prevent, as it does, any captious conflict in rulings, yet each judge has the power to, and if confident he is right, should conduct the proceedings before himself in accordance with his own opinion at the time, whether that conflicts with an earlier interlocutory order or not; and it is immaterial whether that earlier order was made by himself or another judge. *Fort Dearborn Lodge v. Klein*, 115 Ill. 177. That this stipulation is binding, the appellants do not deny. Indeed, they could not do so successfully. *Teal v. Russell*, 2 Scam. 319; *Johnson v. Estabrook*, 84 Ill. 75. But the appellant insists that the proper construction of the stipulation did not entitle the plaintiff below to judgment upon it. The plaintiff there presented to the court, with the stipulation, proof of the further proceedings in the case, No. 17, as they are shown in 20 Ill. App. 500, 125 Ill. 601, and 126 Ill. 355.

The stipulation that the present case should "abide by the issue" of that, meant and means that it should abide "the ultimate result or end" of No. 17. In no other of the many senses in which the substantive "issue" is used could it be appropriate here. Webster's Dictionary, word "issue."

The measure of damages was the only question left open, and if there were errors in the record upon other points, this stipulation would prevent a reversal for such errors. But there were no errors. The action is upon a fire policy for \$5,000. The clause in the policy relied upon by the appellant, "in case of any sale or transfer, or change of title in the property insured by this company, or of any undivided interest thereof, or the entering or foreclosing of a mortgage, * * * this insurance shall immediately cease," does not cover the transactions recited in the decisions of the Comm. Union Ass. Co., to which reference has been made. "In our opinion," say the Supreme Court, in 126 Ill., page 373, "it must follow that the deed of the trustee was not such an alienation as is within the reasonable contemplation of the clause under consideration."

Niagara Fire Ins. Co. v. Scammon.

It is true the clause they were considering had other words than there are in this, to which some of the argument seems to be addressed, but the point of the decision is that a voidable sale by the trustee, against the will of the assured, and by him avoided, was, after such avoidance, as to its effect upon the policy, as if it had never been made.

It does appear that the loss upon the property assured by this policy was \$6,500. If an account between Babcock and Scammon had been taken, there was \$5,000 to be allowed to the latter for an insurance Babcock had collected upon the same loss. In various ways the appellant seeks to make that collection a total or partial defense to this action. But the Supreme Court have held in 126 Ill. 363, that the relations between Scammon and the companies whose policies he held, were not affected by the account between Scammon and Babcock. The loss was more than the policy here sued upon.

So far as this record shows, the decree by which the sale under the mortgage was set aside, was but declaratory of the rights of the parties, and required the taking of an account, to fix amounts. But it settled those rights, and was so far final, that from it an appeal might have been taken. *Chicago Life v. Auditor*, 100 Ill. 478. The parties, so far as the record shows, submitted to it and conducted their subsequent business in subordination to it. The account directed by the decree was never taken, or if it was this record contains no evidence of it. It is but inference that Scammon got any benefit from the insurance to Babcock. Both parties immediately sold to Wirt Dexter Walker, and nobody had any further interest in stating an account.

The appellant asked the court to hold as law a proposition that assumes that Scammon conveyed his interest in the property before the decree. There is no sufficient evidence to base the assumption upon. The deed, though dated before, was acknowledged the same day the decree was entered, and Scammon testified that he sold subsequent to the entry of the decree. There was no apparent effort in the Circuit Court to get at details on that matter. On the whole record there is no error against the appellant, and the judgment is affirmed.

Judgment affirmed.

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JOHN MADDEROM AND HENRY DEYOUNG

v.

THE HEATH & MILLIGAN MANUFACTURING COMPANY,
FOR USE, ETC.

Banks—Parties—Amendment—Private Banker—Insolvency—Check—Presentation—Advancements by National Bank upon Check of—Laches.

1. It is a debtor's duty to seek his creditor if he is within the State.
2. The objection that a suit was brought by the wrong party may be removed by amendment in the trial court.
3. The neglect of the payee of a check to present the same the day succeeding that upon which it was given, imposes upon him only the risk of whatever damage may result to the maker therefrom.
4. In an action by a bank to recover from the drawers of a check paid by it in conformity with an arrangement with the private banker upon whom it was drawn, to receive at the clearing house and to advance money upon checks drawn upon him, the same to be subject to his approval, settlements to be made each day, said banker subsequently becoming insolvent, this court holds that the failure of said bank to return the check in suit to the bank that sent it, by a certain hour in the day, subjected it to the risk that such bank had, after the expiration thereof, changed its position so that a subsequent return would work them an injury that would not have occurred had it been returned within the time limited for that purpose, and declines to interfere with the judgment for the plaintiff.

[Opinion filed April 21, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon.
JULIUS S. GRINNELL, Judge, presiding.

Mr. HUGH L. BURNHAM, for appellant.

Messrs. McMURDY & JOB, for appellee.

Between drawer and payee, the former must stand the loss if the bank fails before the close of business hours on the day after the check is given. *Bickford v. First National*, 42 Ill. 238; *Daniel on Neg. In.*, Sec. 1590 (1); *Syracuse v. Collins*, 3 Lansing, 32.

After the drawee bank has failed it is not necessary to pre-

Madderom v. Heath & Milligan Mfg. Co.

sent checks drawn upon it, as no loss could accrue to the drawer by not doing so. Daniel, Sec. 1591; Syracuse v. Collins, *supra*.

The maker of a check is not discharged by the *laches* of the holder unless he has suffered loss thereby. Stewart v. Smith, 17 Ohio St. 85; Swift v. Jones, 2 Bush (Ky.), 105; Syracuse v. Collins, *supra*.

Obviously neither by implied contract nor because of the error of the inexperienced clerk of the Fort Dearborn National Bank, can the appellants claim anything unless they have sustained loss thereby. They having failed to show any loss thus occasioned, the judgment of the court below should be affirmed.

GARY, P. J. Whether this action should have been in the name of the Fort Dearborn National Bank, for whose use the appellees sue, is a question which, if it could be made here for the first time, the parties waive, and desire a decision on the merits. If such an objection had been made at the Circuit Court it could have been removed by amendment. McDowell v. Town, 90 Ill. 359.

The facts are that August 31, 1888, the appellants made their check for \$120.25, payable to the appellee, on William A. Swart & Co., bankers at Roseland, a part of Chicago about twenty Sabbath days' journey from the business center of the city, and delivered it to the appellees. They indorsed it to the First National Bank, who the next morning sent it to the clearing house. Swart was the whole of his bank, and had an arrangement with the Fort Dearborn National Bank that the latter should receive at the clearing house and pay checks upon him, and that between one and half past one of each day, he or his representative would come to the latter bank, and such checks as he did not want to pay, the bank would return to the bank which sent them to the clearing house, who would refund, and such as he did want to pay he gave a check for on the Fort Dearborn National Bank, with which he kept an account. In the morning of the first day of September, Swart absconded, and his bank having been opened,

was closed at about ten 10 o'clock A. M., of which the appellants had immediate knowledge, their place of business being within two hundred feet of Swart's bank. He paid no attention to his checks with the Fort Dearborn National Bank, and his account there was overdrawn.

This bank had a new clearing house clerk, who had not learned his business, and held the check until after two o'clock P. M., at which hour, it is by the parties here assumed, that the right of the Fort Dearborn National Bank to return the check to the First National Bank, under the rules of the clearing house, expired. The appellants had more than enough money on deposit with Swart to pay the check.

All of Swart's effects went into the hands of a receiver, and no demands upon him have been paid since his bank closed, except through the receiver. The record does not expressly show, but it is a fair conclusion from it, that this check was never presented at Swart's bank, or to the receiver, for payment, but the Fort Dearborn National Bank, by letter, notified the appellants that the bank held the check, and requested payment. It does not appear that the check has ever been tendered to the appellants.

Now, leaving for the present out of view the clearing house feature of this case, and also the relations of the Fort Dearborn National Bank with Swart, it is clear that the bank, either in its own name, or in the present action, and it now makes no difference which, would, under the authorities in this State, without looking further, have a right to recover the judgment they have obtained. The appellees had all the business hours of September 1st in which to present the check. *Bickford v. National Bank*, 42 Ill. 238.

Neglect in that regard only imposed upon them the risk of whatever damage might result to the appellants from it. *Stevens v. Park*, 73 Ill. 387, and cases there cited.

Here no damage resulted. When the Fort Dearborn National Bank notified the appellants that the bank held the check, and wanted payment, their duty to pay became fixed. They knew at ten o'clock in the morning of September 1st, that unless the check was already paid, it would not be.

Any presentment of the check at Swart's bank thereafter would have been idle. No injury could result from omitting it. *Syracuse v. Collins*, 3 Lansing, 29.

When notified that the Fort Dearborn National Bank held the check, it became their duty to go to the bank and pay the check. While the practice is that creditors follow debtors, the law is that the debtor must seek the creditor if he is within the State. Bishop, Cont., Sec. 1437.

Now as to the clearing house feature and the relations between Swart and the Fort Dearborn National Bank. The latter did not pay checks drawn on Swart, but advanced the money upon them, subject to his approval, whether such advance should operate as payment. If he disapproved, the bank had no claim upon him for reimbursement.

The law, therefore, that a bank paying a check purporting to be drawn upon it by a customer, has no redress against an innocent receiver of the money, whatever mistake, fraud or forgery may have intervened, so that it does not touch the title of such receiver to the paper itself, has no application here. When Swart did not accept, as paid on his account, a check received through the clearing house, it was incumbent upon the bank to return it to the bank that sent it to the clearing house by two o'clock the same day.

The consequence of their failure so to return it was—and it was the only consequence that they took upon themselves—the risk that the bank sending the check had, after the expiration of the time for the return of the check, changed its position, so that a subsequent return would work them an injury that would not have come if the check had been returned within the time limited for that purpose. The Massachusetts cases all reviewed in *Merchants' Bank v. Commonwealth Bank*, 139 Mass. 513, cover the whole ground.

A reference to those cases without repeating what is said there, is sufficient for the present case.

Judgment affirmed.

W. N. ALLEY

v.

MINNIE LIMBERT.

Practice—Bill of Exceptions—Motion for New Trial—Failure to Embody in.

1. The only way to preserve a motion for a new trial, and the reasons therefor, so that they may be seen by the court upon review, is to embody the same in the bill of exceptions. This court will not look elsewhere to find matter which can only become part of the record by becoming so embodied.

2. The bill of exceptions is the pleading of the party filing the same, and is to be taken against him, and unless error is made to appear, the action of the trial court must be presumed to be correct.

3. Error can not be assigned on matter on which the trial court has not ruled, and to which that court's attention has not been called.

[Opinion filed April 21, 1890.]

APPEAL from the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

Mr. JAMES B. MUIR, for appellant.

Mr. GEORGE B. POWER, for appellee.

MORAN, J. We are prevented from considering the questions argued by counsel for appellant in this case, because of the condition of the record. He makes two points, that the verdict is against the weight of the evidence, and that damages awarded are excessive. The bill of exceptions sets out no motion for a new trial, but contains the following statement, after reciting the verdict:

"Whereupon the defendant, by his counsel, then and there moved the court to set aside the verdict so rendered and grant a new trial in this cause, and filed the following reasons in writing, and affidavits supporting same, for his motion, to

35	592
41	146
35	592
44	77
44	116
44	130
44	178
44	212
44	387
44	516
44	527
35	592
49	314
35	592
50	262
35	592
98	500

35 592
p115 1822

Alley v. Limbert.

wit: (See affidavits, etc., already copied in this record. See pages, 10, 11, 12.) But the court denied the motion and gave judgment."

It has been frequently held by the Supreme Court, and also by this court, that the only way to preserve a motion for a new trial, and the reasons therefor, so that they may be seen by the court on review, is to embody such motions and reasons in the bill of exceptions. We will not look outside of the bill of exceptions to some part of the record made by the clerk, to find matter, such as instructions, motions and evidence, which can only become part of the record by being embodied in the bill of exceptions itself. We have no right or authority to do so. *Franey v. True*, 26 Ill. 185; *Liverpool L. & G. Ins. Co. v. Sanders*, 26 Ill. App. 559; *C., M. & St. P. Ry. v. Yando*, 26 Ill. App. 601; *C., M. & St. P. Ry. v. Harper*, 26 Ill. App. 621; *C., M. & St. P. Ry. v. Yando*, 127 Ill. 214; *Butt v. Lee*, 27 Ill. App. 419; *Byrne v. Clark*, 30 Ill. App. 651

Now, the bill of exceptions in this case does recite the filing of a motion for a new trial, but it was a motion which set out the reasons in writing, and neither a copy of the motion nor of the reasons in writing are found in the bill of exceptions. There is a reference to affidavits, etc., and to pages 10, 11 and 12 of the record, but even if we might follow such references, which, from the authorities above cited, it will be seen we are not at liberty to do, we should find no motion for new trial or written reasons therefor on any of the pages referred to. The bill of exceptions is the pleading of the party and to be taken against him, and unless error is made to appear, the action of the trial court must be presumed to be correct. In *O. O. & F. R. V. R. R. Co. v. McMath*, 91 Ill. 104, it is said: "If plaintiff in error had filed certain points in writing, particularly specifying the grounds of his motion, then he would, of course, be confined in the Appellate Court to the reasons specified in the court below, and would be held to have waived all causes for a new trial not set forth in his written grounds." In order to sustain the errors assigned by appellant in this court, he must have included them as grounds for the motion

for new trial in the court below, but having set out his reasons in writing, and having failed to show us by the record what they were, or that the reasons assigned here were among them, we must presume against him and in favor of the court below. That is, we must assume that the attention of the court below was never called to the objections against the verdict now urged here, and therefore there was no error committed, for error can not be assigned on matter on which the trial court has not ruled, and to which that court's attention has not been called.

Reasons for a new trial having been called to the attention of the trial court, and appellant being confined here to the reasons urged there, and it not appearing what the reasons there assigned were, it is manifestly impossible for this court to say that the trial court erred in ruling upon the motion.

As there is no error in the record available to appellant, the judgment of the County Court must be affirmed.

Judgment affirmed.

PATRICK M. HENNESSY ET AL.

V.

JAMES J. GORE.

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77	418

*Negotiable Instruments—Note—Maturity—Election as to—Trust Deed
—Foreclosure—Pleading—Contracts.*

1. The law does not permit a word in a contract to be without meaning where one may be reasonably assigned to it.

2. When certain notes and a deed of trust given to secure them are executed at the same time, each note-holder having an interest under said deed, the law blends all the instruments and construes them as one.

3. In a controversy involving the giving of notes secured by a deed of trust conveying leasehold interests, it being contended by defendant that the remedy of the holders of certain two and three years notes was confined to foreclosure, the same not being due by their terms, said holders taking the ground that the maturity of said notes had been accelerated by their election to declare them due, in conformity with a provision in said deed, this court

Hennessy v. Gore.

holds that the action at law upon said notes was properly brought; that it cut no figure that all the creditors involved failed to declare the principal of said deed of trust to be due; that in view of the wording of the special count of the declaration it was doubtful if there was any exercise of the power granted, and that the judgment for the defendant can not stand.

[Opinion filed April 21, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

Messrs. OSBORNE BROS. & BURGETT, for appellants.

Mr. C. H. REMY, for appellee.

GARNETT, J. Appellee, Gore, and Patrick H. Heffron were indebted to Hennessy Brothers, the appellants, and to H. J. Milligan and others, the indebtedness to the several parties varying in amount, the aggregate thereof being \$181,536.89. By arrangement with all of the creditors, Gore and Heffron made and delivered their promissory notes for the several amounts due, that coming to Hennessy Brothers being divided into three notes, the first payable in one year or before, the second in two years or before, and the third in three years or before. The debt due to each of the other creditors was divided and made payable in like manner, so that each of them had three notes. All the notes were dated November 10, 1888, and bore interest at six per cent per annum, payable semi-annually.

To secure payment of all the notes to all the creditors, Gore and Heffron executed and delivered to Lyman J. Gage, as trustee, a deed of trust, dated November 10, 1888, conveying thereby to the trustee certain leasehold estates in Chicago. The deed described all the notes and recited that the conveyance was made for the better securing their payment and interest thereon. There was a stipulation in the trust deed, that "if default be made in the payment of said promissory notes, or of either or of any part thereof, or the interest thereon, or any part thereof, at the time and in the manner

above specified for the payment thereof, then in such case the whole of said principal sum and interest secured by the said promissory notes shall thereupon at the option of the legal holder or holders, or any or either thereof, become immediately due and payable; and on the application of the legal holder of said promissory notes, or either of them, it shall be lawful for the said grantee or his successor in trust, to enter into and upon, and take possession of the premises hereby granted, or any part thereof, and in his own name, or otherwise, to file a bill or bills, in any court having jurisdiction thereof, against said party of the first part, their heirs, executors, administrators and assigns, to obtain a decree for the sale and conveyance of the whole or any part of the said premises for the purposes herein specified, by the party of the second part, as such trustee, or as special commissioner, or otherwise, under order of court, and out of the proceeds of any such sale, first pay the costs of such suit, all costs of advertising, sale and conveyance, including the reasonable fees and commission of said party of the second part, or persons who may be appointed to execute this trust, and \$1,000 attorney's and solicitor's fees, and also all other expenses of this trust, including all moneys advanced for insurance, taxes and other liens or assessments, with interest thereon at eight per cent per annum, then to pay the principal of said notes whether due and payable by the terms thereof, or the option of the holder thereof, and interest due on said notes up to the time of such sale," etc.

The one year note payable to appellants was paid at maturity, but default was made in payment of nearly all the other notes then due. On the 6th of December, 1889, this suit against Gore and Heffron was commenced by appellants to recover the amount of the two and three year notes payable to their order.

The question discussed by counsel is whether appellants' remedy as to the two and three year notes, respectively, is confined to foreclosure. The notes are not due by their terms, but appellants claim their maturity has been accelerated by elections to declare them due, in consequence of the default

Hennessey v. Gore.

in payment of other notes payable to the other parties, and if due they are due for all purposes, and may be the subject of an action at law immediately after such election. The notes and deed of trust were parts of the same transaction, executed at the same time, each noteholder having an interest under the terms of the deed. In such cases the law blends the two instruments, and construes them as one. Reading the note only fails to put the reader in possession of the whole agreement of the parties. *G. & S. W. R. R. Co. v. Barrett*, 95 Ill. 467; *Bearss v. Ford*, 108 Ill. 16; *Gardt v. Brown*, 113 Ill. 475; *Freer v. Lake*, 115 Ill. 662; *Fowler v. Woodward*, 26 Minn. 347.

Appellee, however, claims that the notes and trust deed can not be read together so as to give appellants an action at law on the notes, because appellants are strangers at law to the covenant in the trust deed. Appellants' action is not founded on any covenant in the deed, and therefore *Harms v. McCormick*, opinion of Supreme Court of Illinois, filed October 31, 1889, does not apply. The action is on the notes and the time of maturity is simply hastened by the exercise of a power given to appellants by the terms of the deed. What the effect would have been if, instead of authority to appellants to declare the notes due, they had been compelled to rely upon a covenant with Gage to pay the entire indebtedness, upon default in payment of any note, need not be decided. In any event, this contention of appellee is in conflict with *Noell v. Gaines*, 68 Mo. 649; *Detweiler v. Breckenkamp*, 83 Mo. 45; *Gregory v. Marks*, 8 Bissell, 44; and we think the ruling in these cases sound.

If it was intended to restrict the remedy to foreclosure, these words, "the whole of said principal sum and interest secured by the said promissory notes shall thereupon, at the option of the legal holder or holders, or any or either thereof, become immediately due and payable," are surplusage. The foreclosure with all its incidents, is amply provided for without that clause. The law does not permit a word in a contract to be without meaning where one may be reasonably assigned to it.

Neither can we agree with appellee that all the creditors

were obliged to join in declaring the principal due. A requirement to that effect might have been more prudent and desirable for all concerned. But questions of prudence and policy are foreign to the inquiry.

Now the views here expressed would be decisive of this case, if it had been alleged in the special count of the declaration, that appellants had declared all the unpaid notes immediately due and payable, because of default in payment of the one year notes. But the allegations of that count is, "And the plaintiffs aver that by reason of and for the said default in the payment of the said notes, the holders thereof *declare* the *same* at once due and payable; and the plaintiffs aver that by reason of and for the said default in the payment of said notes the plaintiffs have declared the said two notes first above mentioned at once due and payable." From that it appears that only the unpaid one year notes, and the two and three year notes, payable to appellants, have been declared due. The power is to declare "the whole of said principal sums and interest secured by the said promissory notes * * * immediately due and payable." Taking the special count of the declaration as a statement of the whole truth, it is very doubtful if there has been any exercise of the power granted.

But as the common counts are added to the special counts, and a general demurrer by Gore was sustained to the whole declaration, the judgment must be reversed, and then appellants can amend the special count as they may be advised.

The judgment is reversed and the cause remanded.

Reversed and remanded.

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44	358
35	598
59	327

H. B. VAN VELSOR

V.

C. D. SEEBERGER.

Deceit—Sale of House—Damages.

1. The purchaser of a house must be assumed to have knowledge of such faults therein as are not concealed or covered up, but are open to view or discoverable upon ordinary inspection.

Van Velsor v. Seeberger.

2. A highly exaggerated or even false description by a vendor of an article which is present and open to the inspection of the vendee, does not amount to such a misrepresentation as will support an action for deceit.

3. Where a cause of action exists, at least nominal damages will be presumed and must be allowed, and the fact that the plaintiff in a given case insisted upon substantial damages, and neither tried his case upon a claim of, asked for, or would have been satisfied with nominal damages, can not alter the rule.

4. In an action for deceit brought to recover for fraudulent misrepresentations in the sale of a house, this court holds, in view of the evidence, that the judgment for the defendant can not stand.

[Opinion filed April 21, 1890.]

IN ERROR to the Circuit Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. D. BLACKMAN, for plaintiff in error.

Messrs. WILLIAMS, HOLT & WHEELER, for defendant in error.

MORAN, J. This was an action for deceit brought by plaintiff in error to recover for fraudulent misrepresentations alleged to have been made by defendant in error in the sale of a certain house and lot situated on Michigan avenue near Forty-second street in Chicago. The case was submitted to the court for trial, and there was a finding in favor of the defendant, and from the judgment rendered thereon the appeal is prosecuted.

The false representations are claimed to have been made with regard to the materials and workmanship of a building purchased by plaintiff from defendant. The case was submitted on the plaintiff's evidence, and on certain propositions of law, which the court was requested to hold. It is unnecessary to discuss the propositions of law further than to say that none of them were accurate when considered in connection with the evidence in the case, and they were properly refused by the court. There is, however, a general exception to the finding, and that has compelled an examination of the evidence,

which has led us to the conclusion that there should have been a finding for the plaintiff on the case as submitted. It very clearly appears from the whole proof that plaintiff was in fact "taken in" in the purchase of the house; that the house which he got was so far inferior to the house he supposed he was getting as to be at least a "disappointment," to use the mild word employed by defendant's counsel.

It is true, as argued in behalf of defendant, that many of the defects in the material and workmanship which are complained of, were patent and visible on the most ordinary inspection, and as to such defects plaintiff can not hold defendant liable. Plaintiff was in the house before he purchased, and had the opportunity to examine it, and whatever the representations made to him, he must be held to have knowledge of such faults as were not concealed or covered up, but were open to view or discoverable upon ordinary inspection.

A highly exaggerated or even a false description by a vendor of an article which is present and open to the inspection of the vendee, does not amount to such a misrepresentation as will support an action for deceit, and therefore when defendant described the lumber in the doors and floors and casings and trimmings in the house, when plaintiff was then present looking at it, as "elegant lumber," when it was in fact green, knotty, cheap and second-class, while plaintiff may have been impressed by the assertion and the manner of defendant, he was not entitled to close his eyes to the facts, and base his action on defendant's opinion of the lumber. There are many other alleged defects that were similar to the faults in the lumber, and as to which defendant's statements are not shown to be anything other than the expression of opinion.

But as to other statements, it appears to us to have been different. It appears in the evidence, without contradiction, that plaintiff told defendant during the negotiations, that he relied on his statements as to the construction. In one of the letters written by defendant to plaintiff, it is said: "I believe the house more thoroughly built than any houses built for sale; built them myself and used the best of everything. The

trim is all plinth and pilaster. All floors are deafened, attic has matched floor, headers are double, posts carrying stairs are double, stair headers are mortised and have iron shoes in addition."

The evidence of two builders called, is to the effect that the headers are not double around the fire places and around the stairway, and that there is no deafening in the floors. Ordinarily deafening is made of mortar or sand, but when paper is used, it is made by putting down a layer of paper, then strips nailed on this, and then paper onto the top of the strips. In this house the paper was laid flat between the floors with no air space, and it can not be called deafening. Now this evidence shows that some of the statements quoted from the letter were not true. From the statements by defendant that he built the house himself, it must be inferred, as he intended it should be, that he knew what the facts were, and these defects were in the nature of things concealed, and were just such matters of construction as plaintiff would have to take defendant's representations on, unless he took up the floors to see himself. Of course what is said in the opinion on these questions of fact is based wholly on plaintiff's evidence. Defendant's evidence may present matters in a different view.

It is true the case was so loosely tried, that it is not shown what the damage is arising from these defects. The evidence as to damage relates to the house with all its defects, those for which there can be no recovery, as well as those for which, as the case now stands, we think there should have been a recovery. It is shown that the representations as set out in the letter were made, and that they were made to influence plaintiff to purchase the house; that he relied upon them; that some of those that were material were untrue. It is plain that there is some damage. The house is not as good as it would be if the representations were true. How much the damage is is not shown, but under the circumstances at least nominal damages should have been assessed. 1 Sedg. on Dam., 79; Northrop v. Hill, 57 N. Y. 351; Allaire v. Whitney, 1 Hill, 484; 1 Sutherland on Dam., 12.

The judgment must be reversed and the case remanded for a new trial. *Reversed and remanded.*

GARY, J., takes no part in this case.

Upon Rehearing.

[Opinion filed October 23, 1890.]

WATERMAN, J. Having carefully considered the matters urged in the petition for rehearing, we are inclined to adhere to the opinion already announced.

The rule seems to be well nigh universal that, where a cause of action exists, at least nominal damages will be presumed and must be allowed. Sutherland on Damages, Vol. 1-12; Eaton v. Lyman, 30 Wis. 41; Kidder v. Barker, 18 Vt. 454; Fullam et al. v. Stearns et al., 30 Vt. 443.

Nor do we perceive that the fact that the plaintiff insists upon substantial damages, and neither tried his case upon a claim of, asked for, or would have been satisfied with nominal damages, can alter the rule.

It is urged that if nominal damages should have been given, we give judgment for them here, or remand, with directions that judgment be entered in accordance with this opinion. It is sufficient to say that we do not think the case in its present aspect calls for such action upon our part.

Reversed and remanded.

GARY, J. took no part in this case.

35	602
140*	108
35	602
46	527
35	602
109	1178

PERLEY LOWE, ASSIGNEE,

v.

CANUTE R. MATSON, SHERIFF, ET AL.

Assignments—Attachment—Possession.

1. Upon a sale of personal property in the possession of the vendor, a change of possession is essential to protect the title of the vendee against attaching or execution creditors of the vendor. If the possession remains with the vendor it is fraudulent *per se* against creditors.

Lowe v. Matson.

2. An assignee for the benefit of creditors is a volunteer who pays no consideration, and on principle the law can not extend to him any greater lenity than to *bona fide* purchasers for value. Where the rule operates against the latter it is also enforced against the former.

3. If the property is left in possession of the vendor's agent the change is constructive only, the possession of the agent being that of the principal; and although a servant agrees, in his master's presence, to hold possession for the vendee, his possession remains that of his master so far as creditors of the latter are concerned.

4. The rights of attachment creditors can not be settled on petition by the assignee in the County Court, where the attachments were levied before he took possession.

5. Upon the petition by an assignee, praying, among other things, that possession of certain property levied upon should be delivered to him by the sheriff, this court holds, that in view of the fact that the assignee was never in possession of any of the property in question, the County Court had no jurisdiction of the matters presented by the petition, and declines to interfere with the order dismissing the same.

[Opinion filed April 21, 1890.]

APPEAL from the County Court of Cook County; the Hon.
RICHARD PRENDERGAST, Judge, presiding.

Messrs. JONES & HACKER, for appellant.

Messrs. M. & H. N. CULVER, for appellees.

GARNETT, J. On September 21, 1889, Robert Larkins executed and delivered, in form to satisfy the statute, a deed of assignment for the benefit of creditors to Nathaniel N. Jones, which was filed for record in the recorder's office of Cook county at ten o'clock in the forenoon of September 23d, and in the office of the clerk of the County Court on September 27th.

Before eleven o'clock of September 23d the assignee spoke through the telephone to Edwin H. Stephens, the bookkeeper of Larkins, in charge of his lumber yard in Chicago, telling him of the assignment; directing him to stop selling lumber; to look after things for the assignee, and prepare a statement of the creditors at once, and that he, the assignee, would be at the yard that afternoon.

Stephens at once went into the yard, where lumber was being loaded upon a wagon, and told Larkins' foreman to stop the loading; that there was trouble there. The foreman then had the loading stopped, and Stephens went to work upon the books to make a list of the creditors.

In the forenoon of September 23d judgments were entered in the Superior Court by Larkins in favor of William A. Thompson and Herbert Hammon, severally, the execution in each case reaching the sheriff's hands before 10:30 o'clock in the forenoon of the same day. The sheriff's deputy proceeded to Larkins' lumber yard, arriving there about eleven o'clock, and, having the writs in his possession, made a levy under each writ on the personal property there. Jones, the assignee, went to the yard about two o'clock the same day, found a custodian in possession for the sheriff, who was then notified by Jones that he was the assignee, and at the same time Jones directed Stephens to stay there himself, and to keep a man there at night, until further order of court.

On September 23d a judgment in favor of G. G. Stewart, and another in favor of Charles T. Eddy, against Larkins, were entered in the Superior Court, but the executions issued thereon were not delivered to the sheriff until after he was notified by Jones of the assignment. All four of the judgments were assigned to S. A. Kean & Co., who brought suit thereon September 24th in La Grange county, Indiana, attaching other personal property of Larkins in that county. Before that suit was commenced S. A. Kean & Co. had actual notice of the assignment to Jones, but there had been no change in the possession of the property attached.

Jones resigned his position of assignee on September 27th, and appellant, being appointed his successor, filed his petition in the County Court against the sheriff and S. A. Kean & Co., praying that possession of the property levied on should be delivered to the assignee by the sheriff, and that S. A. Kean & Co. should be directed to release the attachments in Indiana. After hearing, upon evidence introduced by both sides, the court dismissed the petition, and the assignee brings this appeal to reverse the order.

Upon a sale of personal property in the possession of the vendor, a change of possession is essential to protect the title of the vendee against attaching or execution creditors of the vendor. If the possession remains with the vendor it is fraudulent *per se* against creditors, according to the doctrine in Illinois, though not so in some other States. Thornton v. Davenport, 1 Scam. 296; Curran v. Bernard, 6 Ill. App. 341; Lawson v. Funk, 108 Ill. 507; Allen v. Carr, 85 Ill. 388; Wait on Fraud. Conv., Sec. 251. An assignee for the benefit of creditors is a volunteer who pays no consideration, and, on principle, the law can not extend to him any greater lenity than to *bona fide* purchasers for value. Where the rule operates against the latter it is also enforced against the former. Burrill on Assignments, Secs. 271, 272. In Wilson v. Pearson, 20 Ill. 81, it was assumed by the court that the statute then in force relating to chattel mortgages, deeds of trust etc., requiring a delivery of the property to the mortgagee or grantee, or acknowledgment and recording of the instrument, applied to deeds of assignment of personal property for the benefit of creditors. Whether compliance with the terms of the statute as to chattel mortgages would dispense with the necessity for change of possession need not now be decided, but it is apparent from the opinion of the court in that case that, as the instrument was not recorded, delivery of possession to the assignee was thought essential to his title as against an execution creditor.

The change of possession must be actual, not merely constructive. Bump on Fraud. Con., v. 112. If the property is left in possession of the vendor's agent, the change is constructive only, because the possession of the agent is the possession of the principal. In the case of ponderous articles, there need not be an actual removal of the goods and change of possession from hand to hand, but it is sufficient that the vendee assumes the direction and control, and in such an open, notorious manner as usually accompanies an honest transaction. Ib. 166. If the goods are in possession of a bailee, as in Gaar et al. v. Hurd, 92 Ill. 315, notice to the bailee is all the law requires, as that is said to deprive the vendor of all control

over the property. But this does not apply to a mere employe or servant of the vendor. The servant's possession is but the possession of the master, putting no one upon inquiry, and although the servant agrees, in his master's presence, to hold possession for the vendee, his possession remains that of his master so far as creditors of the latter are concerned. *Gray v. Corey*, 48 Cal. 208; *Flanagan v. Wood*, 33 Vt. 332; *Sleeper v. Pollard*, 28 Vt. 709; *Sharon v. Shaw*, 2 Nev. 290; *Chester v. Bower*, 55 Cal. 46; *Hurlburd v. Bogardus*, 10 Cal. 519.

Now, in the case at bar, Stephens was an employe of the insolvent debtor. He does not appear to have had any knowledge of Jones before September 23d. His possession, at and before he received the telephonic communication, was the possession of his employer. He did not even tell Jones that he would take possession, or do anything else for him.

No evidence was introduced to show that the sign was changed, a notice of assignment posted, the gates closed, or any other visible indication given of a change of possession. A careful observer might have seen nothing more than was apparent a week before, to wit, that Larkins, by his employe, was in possession.

Then, so far as the attachments in Indiana may be said to differ from the levies in this county, they are controlled by the fact that S. A. Kean & Co. levied the attachments before the assignee took possession, and therefore the rights of the parties can not be settled on petition by the assignee in the County Court. *Ide v. Sayer*, 30 Ill. App. 210.

In fact, as the assignee was never in possession of any of the property in question, the County Court had no jurisdiction of the matters presented by the petition.

Actual notice to S. A. Kean & Co. of the assignment, before the attachments, can make no difference so long as the failure to deliver possession to the assignee is counted fraud *per se*. *Blatchford v. Boyden*, 122 Ill. 657; *Long v. Cockern*, 128 Ill. 30.

The order of the County Court dismissing the petition is affirmed.

Order affirmed.

Sindelar v. Walker.

GEORGE SINDELAR
v.
JAMES H. WALKER.

35	607
137s	43

Partnership—Chattel Mortgage on Goods of—Foreclosure—Fraud.

1. If one partner and a third person take into their possession firm property, such act will not constitute a trespass.

2. One partner can not recover for a trespass to the firm property directed or assented to by a co-partner.

3. One partner has nothing separately in the *corpus* of the partnership effects. His interest is what remains after the partnership debts are paid, and an account taken.

4. This court holds as proper, the sustaining of a demurrer to the declaration in the case presented, the same alleging that a co-partner of the plaintiff in collusion with the defendant, wrongfully and fraudulently foreclosed a chattel mortgage upon firm property.

[Opinion filed April 21, 1890.]

IN ERROR to the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Messrs. JONES & LUSK, for plaintiff in error.

Messrs. TRUMBULL, WILLITS, ROBBINS & TRUMBULL, for defendant in error.

MORAN, J. The question presented by this record is, whether one partner can maintain an action at law against a third person, who, in collusion with the other partner, wrongfully and fraudulently forecloses a chattel mortgage upon firm property.

Counsel for plaintiff in error contend that such an action can be maintained, and have assigned for error the sustaining a demurrer in the court below to a declaration which alleges, in substance, that plaintiff and one Hubka were partners in the dry goods business and were indebted to the defendant in the

sum of \$2,000, for which the said firm executed to said defendant a chattel mortgage on the stock and fixtures in the said firm's place of business. That it was provided in the said mortgage that said firm might retain possession of said goods and chattels until they should make default, and it was further provided that if said defendant should have reasonable cause to feel himself unsafe or insecure, or should fear or have reasonable cause to fear diminution, waste or removal of said property, then said defendant should have the right to take immediate possession of said mortgaged property; that before said mortgage was due, said defendant, colluding with said Hubka, made a pretended foreclosure of said mortgage, and by collusion as aforesaid, entered upon said premises, took possession of said goods and chattels mentioned in said mortgage, and ousted the plaintiff from the premises and the possession of said goods, whereby the said goods have been and are wholly lost to plaintiff; avers that defendant had no just or reasonable cause to feel insecure or unsafe, or to fear diminution, removal or waste of said property; avers that defendant colluded and confederated together with said Hubka how they might injure, harass and oppress plaintiff, and caused and procured said foreclosure to be made without any reasonable or justifiable excuse.

There is no allegation that the partnership is dissolved, or that there are not debts outstanding, or that an account has been taken. It is very clear that the interest of plaintiff in the partnership property has not been ascertained and therefore the facts alleged do not show that he has sustained any several or individual damage. If the other partner had not consented to the foreclosure and removal of the goods, then both partners might maintain an action against the defendant for the wrong; but one partner can not recover for a trespass to the firm property directed or assented to by the other. In fact, if one partner and a third person take into their possession firm property, this will constitute no trespass. The cases cited by counsel for plaintiff in error do not sustain his position. *Longman v. Pole, Moody & Malkin*, 223, which is chiefly relied on, is not like the case here.

Sindelar v. Walker.

There, one of five partners colluded with the defendant to suppress certain firm indebtedness, and the firm was dissolved, and upon the basis of the indebtedness, as it appeared, a settlement was had, and the partner, who, with defendant, was guilty of the concealment, was paid in full by his co-partners.

Afterward the fraud was discovered, and the other four partners having paid the suppressed debts, the fraudulent partner being a bankrupt, were said to be entitled to recover from the defendant the amount they had lost by reason of his and the bankrupt partner's misconduct. It is quite unnecessary to review and distinguish authorities on this question. They will be found collected and discussed in any of the works on partnership. The case of *Swart v. Morrison*, 103 N. Y. 235, is in point to show that one partner can not maintain an action to recover for an injury to his interests as a partner, done by collusion of his co-partners with others, where there had been no settlement of the partnership accounts.

Counsel's contention that there is a presumption where there are only two partners that each partner is entitled in the partnership goods to the extent of one-half, does not aid him. Neither partner has anything separately in the *corpus* of the partnership effects. The interest of each is what remains after the partnership debts are paid and an account taken. *Menough v. Whitwell*, 52 N. Y. 146.

If counsel had averred in his declaration a dissolution and settlement of the partnership accounts and a payment of all debts, then the presumption which he suggests might be indulged, in the absence of evidence showing the precise interest of each partner.

There was no error in sustaining the demurrer, and the judgment must, therefore, be affirmed.

Judgment affirmed.

E. P. REED & Co.

V.

F. C. PINNEY & Co. ET AL.

35	610
99	187

Replevin—Sale—Fraudulent Representations—Instructions—Evidence—Res Gestæ.

1. To entitle one to rescind a sale of goods that has been induced by false and fraudulent statements, the vendor is only required to show the statements made, that he relied upon them to his injury, and that they were false. The intent or motive with which such false representations were made need not be shown.

2. An instruction is erroneous which requires the jury to find two grounds before the plaintiff can recover, when the finding of either ground would justify his rescinding the contract.

3. If the vendee of goods falsely states his financial ability and obtains the same on the strength of such statements, the vendor may, on discovering the fraud, retake the goods, and in such case it is wholly indifferent what the vendee's intention in fact was with reference to paying for the same; his good faith and intention to pay, based on a belief that he will be able to do so when the time of payment arrives, will not prevent the vendor from rescinding, on the ground that the sale on credit was induced by the false representations.

4. A vendee may be guilty of fraud which will entitle the vendor to rescind the sale, without any false statements whatever, if, knowing that he is insolvent, he buys goods with the intention not to pay for them. To constitute fraud in such case there must be a preconceived design never to pay for the same.

[Opinion filed April 21, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. GEORGE DRIGGS, Judge, presiding.

Mr. JAMES A. FULLENWIDER, for appellants.

Messrs. SIDNEY C. EASTMAN and BOWEN W. SCHUMACHER, for appellees.

MORAN, J. Appellants brought replevin against appellees to recover certain goods they claimed, on the ground that the sale and delivery thereof on credit had been induced by false representations made by appellees as to their financial condi-

tion. On the trial the court refused plaintiffs' instructions asked, and gave, of his own motion, the following: "The jury are instructed that if they believe from the evidence that the plaintiffs relied upon the statements of the defendant as to his financial condition at the time of the sale and delivery of the goods in controversy in this cause, and if the jury further believe from the evidence that such statements were known to the defendant to be untrue, or were made in such a way as to deceive the plaintiffs, and with the preconceived design, or with the intention, at the time, never to pay for them, the purchase was fraudulent, and the jury should find the issues for plaintiffs." The court also gave, at the request of the defendants, the following: "The plaintiff, to entitle him to recover, must prove, by a preponderance of evidence, that defendant Pinney obtained the goods in question from the plaintiff under false and fraudulent representations, made by him to the agent of the plaintiff, as to his financial condition; that such representations were made by Pinney, knowing them to be false, and with the intention of deceiving the plaintiff, and of obtaining the goods in question on credit, and with the intention of not paying for the same."

These instructions announce an erroneous rule. To entitle one to rescind a sale of goods that has been induced by false and fraudulent statements, the vendor is only required to show the statements made, that he relied upon them to his injury, and that they were false; the intent or motive with which such false representations were made need not be shown. "It is fraud in law, if a party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad." *Foster v. Charles*, 7 Bing. 103; *Case v. Ayers*, 65 Ill. 142.

In reversing the case of *Gough v. St. John*, reported in 16 Wend. 645, Cowen, J., said: "I have yet to learn that our standard of legal morality is so low that a man may utter a falsehood, with the view to influence another in a matter of interest, which falsehood shall prove pernicious, and yet the law withhold redress because independent proof

is not given that the speaker intended to work the consequences which follow. This I understood to be the import of the charge. The party may hope and may pray, if he pleases, that the result shall be innocent; it would only add impiety to falsehood; he is guilty of a wrong; the poisoned arrow was aimed by him, and sped from his hand, and he must answer for the effect."

Instructions substantially like those above set out were considered by this court and held erroneous in *Keith et al. v. Goldston et al.*, 22 Ill. App. 457; see, also, *Drabek v. The Grand Lodge*, etc., 24 Ill. App. 82; *Farwell et al. v. Hanchett*, 120 Ill. 573.

The instructions are also faulty in requiring the jury to find two grounds of fraud before the plaintiffs could recover, when the finding of either ground would entitle them to rescind the contract.

Fraud, by the vendee of goods, may be perpetrated in two ways; if he falsely states his financial ability and obtains the goods on the strength of such statements, the vendor may, on discovering the fraud, retake the goods, and in this case it is wholly indifferent what the vendee's intention, in fact, was, with reference to paying for them; his good faith and intention to pay, based on a belief that he will be able to do so when the time of payment arrives, will not prevent the vendor from rescinding, on the ground that the sale on credit was induced by the false representation.

The vendee may also be guilty of a fraud which will entitle the vendor to rescind, without making any false statements whatever, if, knowing that he is insolvent, he buys goods with the intention not to pay for them. *Newmark on Sales*, Sec. 360. In the latter case, to constitute the fraud, there must be a preconceived design never to pay for the goods. *Hanchett v. Mansfield*, 16 Ill. App. 407; *Catlin v. Warren*, 16 Ill. App. 418. The errors pointed out in these instructions require the reversal of the judgment. The court did not err in refusing to admit in evidence the letter from appellants' agent, dated December 31, 1887. Said letter was no part of the *res gesta*.

The judgment will be reversed and the case remanded.

Reversed and remanded.

THE HIGH COURT OF THE INDEPENDENT ORDER OF
FORESTERS

V.

ANNA ZAK.

85	613
136	185
35	613
51	82

Life Insurance—Mutual Benefit Association—Good Standing of Member—Evidence.

1. The good standing of members of orders and societies must be left to the determination of the organizations themselves. Where such organization proceeds to determine the question in accordance with the rules and regulations thereof it will bind the member, and in the absence of fraud, or such irregularity as goes to the jurisdiction of the society in the particular case, the determination will be treated as final and conclusive in courts of justice, and in the absence of peculiar and exceptional provisions in an endowment certificate, issued by such organization, or its by-laws, a court will not look into the moral conduct of one who was in membership at the time of his death, for the purpose of determining whether he was in good standing.

2. The issue of such certificate to the beneficiary is a contract, and creates property rights which are not to be divested save in accordance with the terms of the contract, and the rules of the society, which form a part thereof, and except in cases where the contract provides for a forfeiture of all rights under it, *ipso facto*, on the happening of some event, the good standing of the member in the society will continue, until his *status* therein has been shown to be changed by some proceeding of the society taken in pursuance of its rules and by-laws.

3. The good standing of a member can not be affected by showing his general bad reputation, nor by proving specific lapses from virtue or honesty.

[Opinion filed May 28, 1890.]

APPEAL from the Superior Court of Cook County; the
HON. KIRK HAWES, Judge, presiding.

Mr. C. STUART BEATTIE, for appellant.

“Good standing in a society not only implies that the party is a member of the society, but that he has a good reputation therein. In the present instance, the words are to be con-

strued with reference to the language of the application and the preceding language of the certificate, and when this is done they manifestly mean not only good reputation, but good conduct—*i. e.*, freedom from a violation of the pledge of total abstinence, etc. Had it been designed to make trial and conviction a condition precedent to forfeiture, we must presume that it would have been so said; but nowhere is language used that can fairly be construed to mean this.” *Royal T. of T. v. Curd*, 111 Ill. 284.

While it is true that the members can not be made to suffer the specific penalty until tried according to the code of procedure, still it is not the trial or judgment, but the act, that makes him guilty of “conduct unbecoming a Forester,” and destroys his “good standing;” such is the view taken by Judge Baxter (U. S. C. C.) in *McMurry v. Supreme Lodge*, 18 Cent. L. J. 372, where the certificate contained this “good standing” provision. The by-laws concerning the payment of dues was about the same as here. No notice was required, but it was provided that the delinquent “should be suspended from the Order.” There had been no act of the lodge declaring suspension, but the circuit judge held that “the laws and rules in force did not declare that a member was always in good standing until he had been legally suspended by a valid act of his lodge,” and judgment went for the society, although nothing in the by-laws or application referred to good standing.

Messrs. JONES & Lusk, for appellee.

MORAN, J. This appeal is brought to review the record of the trial court in an action in which appellee recovered a judgment against appellant for \$1,000 on an endowment certificate issued to one Jan Zak, a member of said Order of Foresters, in and by which certificate the said High Court promised to pay to appellee, wife of said Jan Zak, said sum, upon satisfactory evidence of the death of said member, and upon a surrender of the certificate, “provided that said member is in good standing in this order at the time of his death, and provided also that this certificate shall not have been sur-

rendered by said member, and another certificate issued at his request in accordance with the laws of this order.”

Appellant introduced on the trial by way of defense to the claim on his certificate the record of a proceeding in the court of which the said Zak was a member, by which it was attempted to expel him from the order on certain charges which were preferred against him, but as counsel for appellant admits in his brief that the proceeding was irregular, the order without jurisdiction, and the resolution or judgment of expulsion without effect, it is unnecessary to give consideration to that defense.

Appellant offered to prove by one Joseph Benick, a member of the same court of the order to which Zak belonged, that Zak left the city with the wife of the witness and remained away, living in adultery with her for some two weeks, thus breaking up the home and the family of the witness.

This testimony the court ruled to be incompetent, and said ruling is assigned for error, and it is contended that such evidence was admissible to show that Zak was not in good standing in the order at the time of his death. It is said that he was charged before the lodge with having run away with the witness' wife, and having left his own wife in destitution, and with being therefore unworthy of recognition as a brother member of the order, and that a committee had voted to expel him, and that the record of the court or lodge failing to show jurisdiction obtained in accordance with the rules that govern trials in the order, it was proper to prove on the trial of this case this immoral act against him, as showing that he was in bad reputation and not in good standing in his court. The good standing of members in orders of this kind must, in the nature of things, be left to the determination of the societies themselves. When the society proceeds to determine that question in accordance with the rules and regulations of the order, it will bind the members, and in the absence of fraud, or such irregularity as goes to the jurisdiction of the society in the particular case, the determination will be treated as final and conclusive in courts of justice. Hence, in the absence of peculiar and exceptional provisions

in the certificate or the by-laws, the court will not look into the moral conduct of one who was in membership at the time of his death, for the purpose of determining whether he was in good standing.

"The certificate issued to the member is evidence of his good standing, and in the absence of proof to the contrary this condition will be presumed to continue. If, by reason of his conduct or failure to comply with the regulations or requirements of the society, the member has lost his good standing, the society must show the fact, for *status* once fixed is supposed to continue until the contrary is shown." Bacon, Benefit Societies, Sec. 414.

The certificate issued to the beneficiary designated by the member is a contract, and creates property rights which are not to be divested save in accordance with the terms of the contract and the rules of the society which form a part thereof; and it must follow that, except in cases where the contract provides for a forfeiture of all rights under it, *ipso facto*, on the happening of some event, the good standing of the member in the society will continue until his *status* in the society has been shown to be changed, by some proceeding of the society taken in pursuance of its rules and by-laws. His good standing can not be affected by showing his general bad reputation, and certainly not by proving specific lapses from virtue or honesty.

If the records of the society contain evidence of a judgment affecting his *status* as a member, that itself will show him not in good standing when the question arises in a court of justice, and not general or specific charges of immoral conduct on his part which have not been passed upon by the order.

This must be the rule in actions upon this and all like certificates. This in no manner conflicts with the decision in Royal Templars of Temperance v. Curd, 111 Ill. 284, cited and relied on by appellant. There the application for membership contained this: "I further agree that should I at any time violate my pledge of total abstinence, or be suspended or expelled, * * * then all rights which either myself, the person or persons named in certificate, my heirs or

FARRAR v. BRODT.

legal representatives may have upon the beneficiaries' fund of the order shall be forfeited;" and the certificate made the fund payable on the express condition that the member should, while a member of the order, faithfully maintain his pledge of total abstinence, and comply with all laws, rules, regulations and requirements of our order, and provide that otherwise it should be of no effect. With such terms in the contract it is very manifest, as the court said, that "there can not be the slightest ground for pretending that a violation of the pledge of total abstinence does not, of itself, forfeit all right of recovery upon the certificate." It needs no conviction or expulsion by the lodge in such case to bar the claim on the certificate, because, by its terms, proof of breach of a specific condition on which it was issued, *ipso facto*, forfeited all claim under it.

The Superior Court committed no error in excluding the evidence offered, and the judgment must therefore be affirmed.

Judgment affirmed.

J. HAMILTON FARRAR

v.

CHARLES BRODT.

Sales—Real Property—Commission—Recovery of—Agency.

In an action brought to recover commissions alleged to have been earned in making a sale of certain real estate in pursuance of authority in writing, this court declines, in view of the evidence, to interfere with the judgment for the defendant.

[Opinion filed May 28, 1890.]

APPEAL from the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

Messrs. C. A. ALLEN and C. F. LOESCH, for appellant.

Messrs. BOTTEM & SWARTZ, for appellee.

GARNETT, J. This is an action of assumpsit brought by appellant to recover commissions for sale of real estate, which he alleges he made for appellee in pursuance of this written authority:

“CHICAGO, December 10, 1887.

“J. H. FARRAR,

“*Dear Sir:*—You are hereby given the exclusive agency for the sale of my property, 640 Fullerton avenue, together with the ground, 30 x 174 feet to the alley, for the sum of \$10,250 or \$10,000 net. The above agency is given to February 1, 1888.

CHARLES BRODT.”

The property was conveyed to W. P. Dunn, by Brodt, through J. P. Sayer & Co., real estate brokers, about March 21, 1888. The price paid by Dunn was partly money, and the rest property.

Soon after the authority to sell was given to Farrar, he approached Dunn with an offer to sell the premises to him, but nothing definite was arranged between them. Dunn made no bid prior to February 1, 1888, nor does it appear that Farrar informed him of the price that Brodt had fixed on the property. Between the 1st and 13th of February, Dunn did make Farrar a conditional offer, but the condition was never complied with, nor was Brodt obliged to pay any attention thereto. Whatever there was between Farrar and Dunn, it certainly advanced no further than mere treaty. Farrar testified that Dunn was ready to pay \$10,250 for the property on February 21, 1888. That seems to have been a mere conclusion of Farrar without any showing as to a promise or bid from Dunn. But if he was ready to do so, his readiness was clearly brought about by Sayer & Co., with whom alone he was then negotiating.

Farrar also testified that Brodt agreed to continue the exclusive character of the agency after February 1st, which Brodt emphatically denied, but testified that he told Farrar he would not longer commit himself to any one man.

Gallery v. Davis.

The owner was faithful to his promise of exclusive agency until the time expired, and then employed Sayer & Co. Unless the judge before whom the case was tried, without a jury, was bound to believe Farrar in preference to Brodt, no ground for recovery can be easily suggested. The agents who succeeded in disposing of the premises received no information or assistance from Farrar. They were acquainted with Dunn through other transactions, and brought the property to his notice after hearing from a stranger to Farrar, that the owner wished to sell.

It is aside from the inquiry to ask why Sayer & Co. succeeded in selling while Farrar failed. Fair competition with any person licensed by the owner to make the sale was a hazard to which Farrar was exposed the moment his exclusive employment terminated.

His rivals seem to have possessed the most persuasive ways in this instance, and as Brodt appears to have remained neutral between them, he can not be compelled to pay the unsuccessful as well as the successful agents. *Vreeland v. Vetterlein*, 33 N. J. L. 247; *Mechem on Agency*, Sec. 969. His action was entirely fair, open and free from collusion and he should not be punished with a double liability. The propositions of law held by the court are not in conflict with the judgment or the views here announced.

The judgment is affirmed.

Judgment affirmed.

D. J. GALLERY

V.

JOHN DAVIS ET AL.

Master and Servant—Negligence of Servant—Injury to Third Person—Justice—Jurisdiction of.

A justice of the peace has jurisdiction of actions involving injuries to personal property.

35 619
45 879

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

Messrs. RUNYAN & RUNYAN, for appellant.

Messrs. WEIGLEY, BULKLEY & GRAY, for appellee.

GARNETT, J. The judge of the Circuit Court, before whom this case was tried without a jury, settled the issues of fact adversely to appellant, and this court approves his finding. The only question left is one of jurisdiction.

The action was commenced before a justice of the peace to recover damages for the injury to appellee's buggy. The injury was caused by the reckless driving of appellant's wagon by a teamster in his employ.

Appellant says the only action that could be maintained against him for such an unlawful act is an action on the case, and that a justice of the peace has no jurisdiction in that action.

The statute of 1845 did not confer jurisdiction on justices in actions on the case, and it was so held in *I. C. R. R. Co. v. Reedy*, 17 Ill. 580. But the act now in force gives such jurisdiction in actions for injuring personal property, without specifying any class of injuries. This action is certainly of that kind, and the jurisdiction was rightly sustained. *Skinner v. Morgan*, 21 Ill. App. 209.

The judgment is affirmed.

Judgment affirmed.

FREDERICK KRUEGER

v.

CHARLES A. THIEMANN AND M. BRAND BREWING
COMPANY.

Personal Injuries—Negligence of Superintendent—Evidence—Instructions.

Krueger v. Thiemaun & Brand Brewing Co.

In an action brought for the recovery of damages for personal injuries alleged to have been occasioned through defendant's negligence, this court holds as erroneous, the exclusion of evidence proffered by the plaintiff touching the relations of the two defendants, and the action of the trial court in deciding, by a peremptory instruction to find for the defendants, certain questions which should have been submitted to the jury with proper instructions.

[Opinion filed May 28, 1890.]

APPEAL from the Superior Court of Cook County; the
Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. SEARS & ARND, for appellant.

Mr. EDMUND FURTHMANN, for appellees.

GARNETT, J. This was an action on the case for personal injury, which appellant alleges he received through the negligence of appellees. The Michael Brand Brewing Company was the owner of a building in which it was engaged in making some alterations. In the progress of the work the floor in the second story was torn up, and iron beams for a new floor were required to be hoisted by a derrick from the first to the second floor of the structure. Thiemaun was the superintendent in charge of the work. He directed where the derrick should be stationed; he employed appellant, and gave orders to him and the other hands who were assisting in the raising of the beams. At the time in question, two bricklayers in the employ of the Brewing Company were laying bricks in the second story to make resting places for the beams. All the beams but one had been raised to the second floor, and Thiemaun was present, giving orders as to the manner in which that one should be raised. He stood on one side of the derrick, holding the rope attached thereto. He ordered one of the workman, Neuenfeldt, to put the rope around the beam, which was done, and then directed appellant to hold the beam, and balance it so that it would not strike the column of the building while rising. Appellant held the beam as

directed, and Thiemann, as soon as Neuenfeldt said he was ready, gave the order to "hoist away."

The crank was turned by another workman, and the slack of the rope was being taken up when the rope struck a beam on the second floor, throwing it down upon appellant and causing the injury complained of. The evidence introduced by appellant certainly had a tendency to prove all the facts stated. Appellees offered no evidence, but the court instructed the jury to return a verdict for the defendant. Motion for new trial was overruled, and judgment rendered on the verdict. The plaintiff appeals.

The exact relations between Thiemann and the Brewing Company are not disclosed by the evidence. Appellant attempted to show that Thiemann was engaged on the job by contract with the Brewing Company, but the evidence was rejected. What the facts are, in this respect, may be important to the Brewing Company, as well as to the plaintiff. If Thiemann was not employed at all, or was an independent contractor, the company might not be liable for his neglect. *Village of Jefferson v. Chapman*, 127 Ill. 438; *Cooley on Torts*, 643, *et seq.* On the other hand, the right of recovery against the company may depend upon its employment of Thiemann (although the presumption is that he was engaged in its service—*City of Chicago v. Johnson*, 53 Ill. 93), and therefore the evidence should have been admitted. But the facts which the evidence tended to prove made a *prima facie* case for the plaintiff, and should have been submitted to the jury, with proper instructions. Whether Thiemann was negligent in failing to have the beams secured on the second floor, so that they would not be thrown off by the operation of the derrick below, and whether he was guilty of negligence in managing the derrick, were questions of fact for the jury, and the court erred in deciding them by a peremptory instruction. The judgment is reversed and the cause remanded.

Reversed and remanded.

Nyquist v. Martin.

GUSTAF NYQUIST
v.
GEORGE P. MARTIN.

Landlord and Tenant—Recovery of Rent—Lease—Ambiguity.

In an action brought for the recovery of rent, this court holds that the evidence justified the finding of the trial court that the lease involved was duly delivered, and that the error therein touching the year in which it was to end, can not affect the right of recovery thereon.

[Opinion filed May 28, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. S. WHIPPLE GEHR, for appellant.

Messrs. BOTTUM & SWARTZ, for appellee.

Per Curiam. This appeal is brought to review a judgment rendered in favor of appellee and against appellant for the sum of \$60, for rent due under a lease. It is first contended that the lease was not delivered, and while there is some conflict of evidence on this point, an examination of the record convinces us that the evidence not only supports the finding of the court that the lease was delivered, but fully preponderates in favor of such conclusion.

The next contention is that because of a mistake in writing the lease, it is made to end April 30, 1808, instead of 1888, and so there can be no recovery upon it. There is some ambiguity caused by the writing of the figure "8" instead of the word "eighty" before the word "eight," but we are of opinion that no violence is done to the writing by reading it 1888.

The objection is the merest technicality, and is invoked to work an injustice. There is no merit in the appeal and the judgment must be affirmed.

Judgment affirmed.

LEWIS UMLAUF
v.
VICTORIA UMLAUF.

Divorce—Custody and Support of Children—Arrears.

1. This court declines to interfere with a decree holding that so long as the custody of the child in question continued with the mother under the original decree awarding the same, her right to the amount awarded by that decree for his support likewise continued.

2. A decree in such case, that children shall not be removed out of the county in which they reside, is in accord with the directions of the Supreme Court, that both parents "shall have the privilege of visiting and freely communicating" with the same.

[Opinion filed May 28, 1890.]

APPEAL from the Superior Court of Cook County; the
Hon. EGBERT JAMIESON, Judge, presiding.

Mr. LEWIS UMLAUF, *pro se*.

Messrs. BLANKE & CHYTRAUS, for appellee.

GARY, P. J. The facts relating to the controversy between these parties sufficiently appear in 27 Ill. App. 375, and 128 Ill. 378, under title as above. When the case returned to the Superior Court, under directions, as shown in the latter report, "to so modify its decree as to give the custody of the oldest child to the appellant, and to so reduce the amount to be paid monthly by the appellant as to require him to pay appellee \$20 per month, instead of \$40 per month, for the support of the youngest child, and to provide that both appellant and appellee shall have the privilege of visiting and freely communicating with both of said children," the Superior Court entered a decree in substance, as follows:

"This case, having been reinstated in pursuance of the mandate of the Supreme Court of the State of Illinois, and coming to be heard upon the order of said Supreme Court on

Umlauf v. Umlauf.

May 16, 1889, directing a modification of the decree heretofore entered in this cause, fixing the custody of the children of said parties, and the amount to be paid monthly by the said Lewis Umlauf for the support of the said children, and it appearing that said Lewis Umlauf is in default in his payments, under the decree in said cause of April 22, 1887, to the amount of three hundred and sixty dollars (\$360), being the sum in arrear on the allowance for the support of Arthur Umlauf, from the first Monday in November, A. D. 1887, up to the time of filing the opinion of the Supreme Court in this case, it is ordered that said Lewis Umlauf pay to said Victoria Umlauf the said sum of three hundred and sixty dollars (\$360), the amount in arrear under the decree of April 22, 1877.

And the said Lewis Umlauf, having moved the court for an order committing to him the custody of the said Arthur Umlauf, it is ordered that the said Victoria Umlauf shall produce in court the said Arthur Umlauf forthwith; and that the said Lewis Umlauf, upon the production of the said Arthur, have the custody of the said Arthur; and that hereafter, and from and after the date of the filing of said opinion of the Supreme Court, to wit, May 16, 1889, the said Lewis Umlauf be relieved from paying into court, monthly, the \$20 required by said decree of April 22, 1887, for the support of said Arthur; but that the said Lewis Umlauf continue the payment of said \$20 for the support of said Oscar, at the office of the clerk of the court, and to the said clerk, and to be paid over by the said clerk to the said Victoria; and it is further ordered that the said Lewis Umlauf pay the costs of this proceeding, to be taxed; and that the said Victoria shall have the privilege of visiting and freely communicating with the said Arthur, and the said Lewis Umlauf shall have a like privilege of visiting and freely communicating with the said Oscar; and neither of said children be removed from said Cook county." From this decree he again appeals, and insists that the directions of the Supreme Court required such a modification of the decree of the Superior Court, then under review, that the reduction of the amount to be paid from \$40

to \$20, should go into effect from the time when he filed his petition, October 13, 1887, or at least from the time of the denial of it by the Superior Court, December 21, 1887. He also insists that the finding of the amount in arrear, and directing the payment thereof, and the restraint upon him as to removing the oldest child from Cook county, are errors.

As to the finding of the amount in arrear and directing payment thereof, the worst that can be said of it, if the modification of the decree dismissing the petition was properly made to take effect only from the time that the opinion of the Supreme Court was filed, is, that it was unnecessary and superfluous.

If the original decree of April 22, 1887, continued in full force until May 16, 1889, the computation of the sum in arrear was merely arithmetical, and the directions to pay were already in the original decree. It was, however, fit and proper that the whole obligations of the parties should be found, fixed and settled by the decree, which put them on a new basis.

Now, as to the date when the modification should go into effect, the Supreme Court gave no explicit direction. The Superior Court was bound to follow the intention of the Supreme Court, if that could be ascertained. The \$20, from the payment of which the appellant was to be relieved, was for the support of the child Arthur. He had continued in the custody of, and been supported by the appellee. That burden which she had carried the Supreme Court could not remove. Did that court intend to deprive her of the means enabling her to bear it? That is not probable, and they have said nothing indicating such intention. The Superior Court was therefore right in holding that so long as her custody and support of the child continued under the original decree unreversed, her right to the amount awarded by that decree for his support continued also.

The restraint upon removing the child was in obedience to the direction of the Supreme Court to so provide that the appellee should have the privilege of visiting him. If he

Jewelers' Mercantile Agency v. Douglass.

might be removed from the county, where both parties have their home, the exercise of the privilege would be more inconvenient and difficult, if not impossible.

There is no error and the decree appealed from is affirmed.

Decree affirmed.

THE JEWELERS' MERCANTILE AGENCY (LIMITED)

v.

WILLIAM A. DOUGLASS ET AL., IMPLEADED, ETC.

Libel—Foreign Corporation—Action by.

A foreign corporation may maintain in this State an action for libel.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Messrs. McMurdy & Job, for appellant.

Messrs. Knight & Brown, for appellee.

GARY, P. J. This is an action for a libel. It is not necessary to set out the matter published, as the imputation upon the appellants as to their manner of doing business would be clearly libelous if published of an individual, and special damage is alleged, so that if the appellants constituted a domestic corporation, they might sue. It is, however, a New York corporation.

Whether a foreign corporation can maintain such an action is a question which the Supreme Court did not find in 1868 to have been decided, and the counsel in this case are, on that subject, no wiser now than the Supreme Court was then. *Hahnemannian Life Ins. Co. v. Beebe*, 43 Ill. 87.

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Thurber v. Anderson.

All actions *ex contractu*, and for physical injuries to, or conversion of their personal property, such corporations are permitted to prosecute without question; why should there be any difference, if they have suffered pecuniary loss wrongfully, whether the spoliation be visible and tangible in its effect, or that effect is to be ascertained through the relation of causes and their consequences? The judgment of the Circuit Court sustaining the demurrer to the declaration will be reversed and the cause remanded.

Reversed and remanded.

HARRIETT A. THURBER

v.

PETER W. ANDERSON.

Master and Servant—Building Contract—Balance Due—Extras.

In an action brought to recover for extra work in connection with the erection of a building, this court declines, the evidence being sharply conflicting, to interfere with the verdict for the plaintiff.

[Opinion filed May 28, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. FRANCIS L. BURTON, for appellant.

Messrs. ARMSTRONG, REED & DYCHE, for appellee.

Per Curiam. This is an appeal from a judgment in appellee's favor, in an action brought to recover for certain alleged extra work done by appellee in erecting a building for appellant.

There is no complaint of any ruling of the court, but the whole effort of counsel is directed to a review of the facts,

Nat. Gas Light & Fuel Co. v. Miethke.

and to argument that the verdict of the jury should be in favor of appellant. The evidence is directly conflicting on the main question of fact in the case, and it is impossible that this court should determine that conflict with more justice or intelligence than the jury before which the witnesses appeared and testified.

We have examined the evidence in the record, and it can not be said that it does not support the conclusion reached. There is doubtless much confusion and uncertainty shown as to the contract and the extras, and some irregularity or lack of correspondence in the copies of the specifications produced by the respective parties, but it was for the jury to reconcile the contradictions and inconsistencies, so far as they could, and to determine from the whole evidence which party was entitled to be believed, and they having done so, and their conclusions having received the approval of the trial judge, and no error of law appearing in the record, it is not within the province of the court to interfere with the verdict. The judgment must be affirmed.

Judgment affirmed.

THE NATIONAL GAS LIGHT AND FUEL COMPANY

V.

JOHANNA MIETHKE, ADM'X.

Master and Servant—Negligence of Master—Personal Injuries—Expert Testimony.

1. A witness should not be permitted to state the inference or conclusion from a given state of facts, which it is the province of the jury to draw for themselves.

2. Where a question relates to some branch of science, or some particular art in which the witness is shown to have attained skill by study and experience, his opinion may be received.

3. In an action brought to recover for personal injuries alleged to have been occasioned through the negligence of the defendant, this court holds, in view of the introduction of improper testimony on behalf of the plaintiff, that the verdict in her favor can not stand.

35	629
41	275
35	629
43	614
35	629
69	70

35	629
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[Opinion filed May 28, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. EDWARD W. RUSSELL and WILLARD M. McEWEN, for appellant.

Messrs. PAGE, ELIEL & ROSENTHAL, for appellee.

"The opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject-matter so far partakes of the nature of a science, art or trade, as to require a previous habit or experience or study in it, in order to acquire a knowledge of it." Rogers on Expert Testimony, Sec. 10.

"The opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance." Muldowny v. The Illinois Central Ry., 36 Ia. 473.

The opinion of an expert is admissible "because a man's professional pursuits, his peculiar skill and knowledge in some department of science, not common to men in general, enable him to draw an inference, where men of common experience, after all the facts proved, would be left in doubt." New England Glass Co. v. Lovell, 7 Cush. 319.

MORAN, J. Appellee recovered a judgment in the court below for the death of her husband, caused by the alleged negligence of appellant, while in the employ of appellant at Minneapolis, Minnesota. The second count of the declaration sets up the statute of Minnesota, which gives an action to the personal representatives of the deceased against the party whose wrongful act or omission caused the death, and said count no doubt sets out a good cause of action. Deceased was killed by an iron plate of about 340 pounds weight falling upon him,

while he was at work laying brick in a portion of the gas works which appellant was erecting at Minneapolis, said iron plate having been thrown by an explosion, in what was known as a scrubber, being a part of the apparatus of said gas works.

This scrubber was a sheet iron cylinder six feet in diameter, twenty feet high, and divided in two by a vertical diaphragm which reached from the bottom to within about eighteen inches of the top. The iron on the sides of the scrubber was about five-sixteenths of an inch thick, and there were in all six doors opening into it, three on each side of the diaphragm, arranged in pairs, the lower pair being about six inches from the bottom. The scrubber was filled on each side of the diaphragm with pine blocks, which served to purify the gas that came in contact with them, by removing from it the tar. The top of the scrubber was the iron plate, which was blown off by the explosion, and carried through the roof of the building, and which came down upon decedent at the point where he was at work.

The scrubber was at the time of the explosion connected by a pipe with a gas holder, in which gas was kept for distribution, and which was under constant pressure. Attached to said pipe was a Chapman valve, which had been placed by, and was under control of appellant, and there was also on the same pipe, near the gas holder, another valve, which was under the control of the Minneapolis Gas Light Company, for whose use the appellant company was constructing the new works. At the time of the explosion some mechanics were working at the lower doors of the scrubber on the opposite side of the diaphragm, from that on which the pipe entered; and for the purpose of testing the fit of the doors a lighted candle was placed inside the scrubber, whereupon the explosion took place.

In order to recover it was incumbent on the plaintiff to prove that the explosion was caused through the negligence of appellant, and her theory was that the Chapman valve was not properly tested, and was leaky, and that gas from the holder was introduced into the scrubber through the pipe and

valve, and diffused itself through the space on each side of the diaphragm, and that when the flame of the candle came in contact with it, it ignited and caused the explosion. Appellant combated this theory, and the principal issue of fact in the case, was the issue made between evidence tending to support and to oppose this contention. The testimony of one James A. Dodge, a professor of chemistry at the State University at Minneapolis, taken by deposition, was read by appellee, from which it appeared that the witness made an examination of the premises and machinery of the gas works, and particularly of the scrubber, immediately after the explosion. The witness described the plan of the scrubber, and some of the conditions which he discovered during the examination, and then, against the objection and exception of appellant, the court allowed the following question and answer to be read to the jury:

“Q. What opinion or conclusion, if any, did you arrive at from that examination as to the cause of the explosion?”

“A. My opinion is, that the explosion was caused by gas from the gas holder passing through the pipe on the right hand of the scrubber, and entering the scrubber, and mixing with the air already in the scrubber, and being ignited by some flame applied at the lower part of the scrubber on the left hand side, probably by the door that I have mentioned.”

The admission of this testimony was in violation of the principle, well settled and abundantly illustrated by adjudged cases, which governs the introduction of expert or opinion evidence. A witness is never permitted to take the place of the jury, and render the verdict for them, by stating the inference or conclusion from a set of facts, which it is the province of the jury to draw for themselves.

It is no reason for admitting the opinion of a witness that he may be, because of his education or superior intelligence, more capable of reasoning to correct conclusions from ascertained facts, than the average juror may be supposed to be. Where the question relates to some branch of science, or some particular art in which the witness is shown to have attained skill by study and experience, the opinion may be received, because the

relation of facts and results in such science or art can only be understood and determined by persons skilled and experienced therein. For instance, the skill of this witness as a chemist would entitle him to state to the jury the physical law of the diffusion of gases, or the proportion of gas and air which would constitute the most explosive mixture, and to give an opinion as to whether gas would pass through a valve which would be impervious to water under the same pressure. Opinions of the expert on such questions are evidence of facts to be taken by the jury and considered in connection with other facts, such as the connection of the gas holder with the scrubber, the apparent force of the explosion upon different parts of the cylinder, the appearance of the *debris* after the explosion, etc., from all of which they should draw the conclusion as to the cause of the explosion, and what, if any, negligence contributed to bring it about.

The opinion given was not upon matter within the proper domain of expert evidence. *Birmingham Fire Ins. Co. v. Pulver*, 27 Ill. App. 17; affirmed 126 Ill. 329; *City of Chicago v. McGiven*, 78 Ill. 347; *Ferguson v. Hubbell*, 97 N. J. 513; *Citizens' Gas Light & Heating Co. v. O'Brien*, 15 Ill. App. 400; *Muldowney v. The Illinois Central Ry.*, 36 Iowa, 473.

It may be that if the facts had been stated, and no opinion given, the jury would have reasoned to the same conclusion reached by the witness; but there were other theories of the explosion which the appellants contended for, and introduced evidence to sustain, and it is impossible for us to say that the improper testimony had no effect in producing the verdict. It is only when the court can say from a consideration of the entire record that the verdict could not have been different if the evidence had not been admitted, that reversal for such an error can be avoided. Other points are argued by counsel for appellant, but we do not think it is necessary to enter into a discussion of them.

For the error indicated, the judgment must be reversed and the case remanded.

Reversed and remanded.

35	634
68	632

NICHOLAS B. DELAMATER

V.

FRANCES KEARNS.

Negotiable Instrument—Note—Guaranty—Indorsement.

1. There is no presumption of guaranty from the indorsement of a note by a stranger, where the contract is written out on the back of the note in terms pointing to a different liability.

2. In an action against the indorser of a promissory note, this court holds, there being no evidence of diligence to collect from the maker, or that a suit against her would have been unavailing, or that she had absconded, or resided out of or had left the State, that the judgment for the plaintiff can not stand.

[Opinion filed May 28, 1890.]

APPEAL from the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

Mr. N. A. PARTRIDGE, for appellant.

Mr. S. B. MINSHALL, for appellee.

GARNETT, J. The only question calling for decision in this case is whether the contract sued on was a guaranty or indorsement.

The instrument relied on is this:

“§210.

CHICAGO, ILLS., 1885.

“One year after date I promise to pay to the order of Frances Kearns, two hundred and ten dollars, at my office, with interest at eight per cent per annum, value received.

“JULIA A. KING.”

Written on the back were these words:

“Endorsed by

“N. B. DELAMATER.”

The presumption of guaranty arising from a blank indorsement by a stranger to a note, is of no value in this case, as

Delamater v. Kearns.

the indorsement with which we are dealing is not in blank. The authorities on this point have been limited to blank indorsements, as in *Kline v. Currier*, 14 Ill. 237, and subsequent cases, and we believe no authority can be found in this State to favor the presumption, where the contract is written out on the back of the note in terms pointing to a different liability.

The meaning of "indorse" is commonly understood to be different from that of "guaranty."

In Chap. 98 of the Revised Statutes, the word "indorsement" is used to express an act that imposes the well known statutory liability upon the indorser, and which is very far short of the undertaking of a guarantor. This meaning of the contract of indorsement was recognized in *Eberhart v. Page*, 89 Ill. 550. One of the rules for interpretation of written contracts is, that the words are to be understood in their plain and literal meaning, although the consequences may not have been in the contemplation of the parties. *Anson on Contracts*, 2d Am. Ed. 330. Another that—"every clause and even every word should, when possible, have assigned to it some meaning. It is not allowable to presume, or to concede when avoidable, that the parties in a solemn transaction have employed language idly." *Bishop on Contracts*, Sec. 384.

If we are to say that appellant intended a guaranty of the note, it must be because a fragment of his contract means exactly what the whole of it means. This can not be unless the first two words are arbitrarily rejected. If it was a guaranty, nothing need have been set down but his name. When something more was written which, by common consent, imports an undertaking less absolute than his bare signature would, that something must have its usual and natural effect.

Where "indorse" has been construed to mean "guaranty," it has been in connection with other words, indicative of an intention to assume the latter liability, as in *Glickauf v. Kaufman*, 73 Ill. 378, and *Tatum v. Bonner*, 27 Miss. 760. The indorsement of appellant meant that, in certain contingencies, defined by the statute, he would pay the note, and it meant this as fully as if the agreement had been written out in

words. That was the legal effect of the indorsement, and it can not be varied by proof of a different parol agreement. *Mason v. Burton*, 54 Ill. 349.

There was no evidence of diligence to collect from the maker of the note, or that a suit against her would have been unavailing, or that she had absconded, or resided out of, or had left the State, and therefore the judgment should have been for the defendant. The judgment is reversed.

Judgment reversed.

GARY, P. J. I dissent on the ground that the words "endorsed by" are not to be read as words of contract but only as descriptive of what would have appeared without those words.

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88 539

CHRISTIAN SACK

V.

JOHN DOLESE AND JASON H. SHEPARD.

Master and Servant—Negligence of Master—Failure to Furnish Proper Machinery — Personal Injuries — Inspection — Foreign Cars — Latent Defects—Evidence—Burden of Proof.

1. A master must use diligence in providing and maintaining safe machinery and appliances to be handled by his employes, and he is bound to inspect the cars of other persons or companies which his servants are required to operate in the course of their employment.

2. Before it can be said that the master's negligence in failing to inspect was the cause of an injury, it must be shown that the fault or defect in the appliance in question was one which a proper inspection would have disclosed, even though, from the nature of the accident, it may be readily concluded that some defect did in fact exist.

3. In such cases the burden of proof is upon the plaintiff.

4. In an action brought by a servant to recover from his employers for personal injuries alleged to have been occasioned through their negligence, this court declines, in view of the evidence, to interfere with the verdict for the defendants.

[Opinion filed April 21, 1890.]

Suck v. Dolese.

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Messrs. EDMUND FURTHMANN and JOSEPH H. FITCH, for appellant.

Messrs. CAMPBELL & CUSTER, for appellees.

MORAN, J. Appellant was at work for appellees in a quarry near to which was a machine for crushing the stone. The crushed stone was run from the crusher through a spout into cars, and as each car was filled it was run out on the track and an empty one brought up under the spout. The motion given to the full car would send it slowly along the track, and it was the duty of the man who was engaged in running out the full and bringing in the empty cars, to run after such moving full car and climb on to it, and set the brake so as to stop the car. In attempting to stop a car in that manner on August 6, 1888, appellant was injured. He was employed to work in the quarry with a pick and shovel, but had on one or two instances worked at the crusher handling the cars. On the day of the accident he was directed by the foreman to attend to the cars, the man who usually attended to that work being absent. In attempting to stop a loaded car which had just run out, the brake gave away in some manner, and he was thrown to the ground, and the wheels of the car ran over and crushed the fingers of one hand and one of his feet, causing a serious and permanent injury. He gave, on direct examination, an account of the manner in which the accident happened, as follows:

“When I moved the car so far, I loosened the rope and ran around and was jumping on the car; then I put on the brakes; I was pulling on the brakes in order to stop the car, because the cars are stopped there. * * * The car was still in the act of running slowly; I was holding with all my strength the brake to stop the car, then I got a sort of push from the brake; it swung me about, and I fell down and the car ran over me; that is all; the brake threw

me down around; I was taking hold of it with all my might, and with all my strength, that is why it threw me. Something loosened on the chain below; the wheel I had in my hand turned, the chain gave way, that is, on the handle below on the brake."

On cross-examination he said: "I pulled the brake very hard on the car on which I was standing when hurt; I could not see what happened to the brake, I only felt that something had happened; there was something loosened on the chain below, so that the wheel I had in my hand turned; I could not think anything else was the matter because the handle remained as it was, and something must have happened to the chain."

There was no evidence showing what, if any, defect was in the brake, or brake chain, but it was shown that the car on which the accident occurred did not belong to appellees, but was a "belt line" car, and that said car was not inspected by appellees' inspector. At the close of the plaintiff's evidence the court instructed the jury to find the defendants not guilty.

There is no basis for the contention that plaintiff was injured by reason of lack of skill in performing the work which he was ordered to do. Assuming that he was in fact unfamiliar with the work, there is no evidence tending to show that he did not do it as well as the most skillful could have done. There is no pretense that he did not do the right thing at the right time and in the proper manner. His injury was clearly due to the breaking, from no fault of his, of the appliance which he was handling, therefore the only count of his declaration which the evidence would fit, is the one charging a failure on the part of the appellees to furnish in and about the work which appellant was directed to do, proper cars, equipped with suitable appliances and brakes for stopping and operating the same, and keeping them in proper repair, and that by reason of the carelessness and negligence of appellees in that regard, plaintiff was injured. Was it error for the court to refuse to submit the evidence to the jury under this count?

There was no evidence introduced or offered by plaintiff to

show that the brake of this car was improperly constructed, or in what the defect in it consisted. The plaintiff's right to recover depended upon the proof of injurious negligence by the defendant. We agree with counsel for appellant, that the rule is well settled that the employer is bound to use diligence in providing and maintaining safe machinery and instrumentalities, to be handled by the employes, and that in the operation of cars a most efficient and perhaps a necessary method of discharging that duty is to maintain a careful system of inspection, to see that the necessary appliances in use thereon are in good order, and sufficient to answer the purposes for which they are intended. We also agree that the same rule of reasonable care with reference to proper machinery and inspection applies, in the case of cars belonging to other persons which the servant is required to operate in the course of the master's business, as governs when the cars are owned and provided by the master himself. Therefore for the purposes of this case we assume that appellees are responsible for defects in the apparatus on the belt line car on which the accident happened, to the same extent and upon the same principles as they would be, if the injury was occasioned by a car belonging to appellees, and which was in use by them to remove the crushed stone. But there is in this case no proof which would make appellees liable if the accident had occurred on one of their own cars. Plaintiff neglected to prove a necessary element in his case; he has not shown that the accident was the result of negligence on the part of appellees. He alleged such negligence in his declaration and the burden was on him to prove it. Proving that the brake chain parted, or that something gave out, so that the brake wheel suddenly turned with him and threw him from the car, does not show that appellees were guilty of negligence. Why did the brake chain part? Was it too light, not of the usual and proper size, or not properly attached? Did it break because of a defect in one of the links, or was it worn out from use? If there was a defect in it, could it have been discovered by proper inspection? To these questions the evidence introduced by plaintiff furnishes no answers.

It is suggested, however, that plaintiff proved that there was no inspection of this car, and that the failure to inspect throws on appellees the burden of showing that the brake apparatus was properly constructed, and that there was no defect in it that an inspection would have disclosed.

This imposes the burden on the wrong party, and compels the defendant to prove that the injury *did not* result from his negligence. The proposition goes on an unwarrantable assumption, to wit, that an inspection would have discovered the defect in the brake. That is an affirmative proposition to be shown by the evidence, and the burden of proving it rests on him who asserts it. If plaintiff had shown that the fault in the brake was in fact known to appellees' foreman, or car inspector, but unknown to himself, he would have made out his case, and so, too, he would have made his case had he shown that the defect was of such a nature that it would have been known to them if they had exercised due care. No defect is latent which an inspection will discover; hence appellees would be charged with knowing what an inspection would inform them of; but before a court or jury can say that this negligence in failing to inspect the car was the cause of plaintiff's injury, it must be shown by the evidence that the fault or defect in the appliance was one which a proper inspection would have made known to them. This appears to be true on principle, and it is very clearly established by authority. In *C. C. & I. C. Ry. Co. v. Troesch*, 68 Ill. 545, it is said: "The cases in this State and in sister States are with great unanimity to the effect, if injury arises from a defect or insufficiency in the machinery or implements furnished to the servant by the master, knowledge of the defect or insufficiency must be brought home to the master, or proof given he was ignorant of the same through his own negligence or want of care, or, in other words, it must be shown he either knew, or ought to have known the defects which caused the injury."

In *C. & A. R. R. Co. v. Platt*, 89 Ill. 141, the injury was caused by a defective ladder which plaintiff was obliged to use in the performance of his duty as a brakeman. An instruc-

tion was given which told the jury in substance that if it was necessary for plaintiff in discharge of his duty to go upon said ladder, and that while going thereon the top step or round gave way, or pulled out, through a defect in the same, the jury should find for the plaintiff, if they believed from the evidence that the plaintiff had no notice of the defect. In reversing the case for the giving of that instruction the court said: "That instruction makes the supposed facts therein stated conclusive, when the facts stated might exist and yet the defendant be free from negligence. So far as is shown by the testimony, the car in question was in good order in all respects. This instruction omits an important element necessary to charge the company, and that is knowledge on the part of the company of the defect in the ladder, or their ability to acquire this knowledge by the exercise of the highest degree of care bestowed upon its construction and condition. * * * Actual knowledge of the defect is not necessary, it being sufficient that the company might have been informed by the use of such diligence as the law imposed upon it; but when it did not know and could not have informed itself of the defect, the company can not be held responsible."

In *E. St. L. P. & P. Co. v. Hightower*, 92 Ill. 139, the above quoted cases are followed, and it is said that without proof that knowledge of the defect in the pipe which in that case caused the injury might have been obtained by reasonable diligence, there could be no recovery, and that the burden was upon the plaintiff to make such proof. As illustrating the same rule see *C. & A. R. R. Co. v. Pratt*, 14 Ill. App. 346, and *C. & A. R. R. Co. v. Stites*, 20 Ill. App. 648.

Authorities directly in point are not wanting in other States. In *Morrison v. The Phillips*, etc., *Cour. Com.*, 44 Wis. 405, the injury was to horses that were being transported, and was caused by the breaking of one of the wheels under a freight car, but it was not shown what the defect or flaw in the wheel was; that trial court directed a verdict for the defendant as was done in this case, and the Supreme Court approving such action, used this language: "The

respondent's liability depending upon the carelessness or fault of its agents, employes or managers in some way, and appellant's right of recovery depending upon the same being clearly shown by evidence, and it being his duty to furnish such evidence, it certainly was incumbent upon him to show how and why the accident occurred." See also *Ballou v. C., M. & St. P. R. R. Co.*, 54 Wis. 257, for a discussion of a kindred subject.

In *Ladd v. N. B. R. R. Co.*, 119 Mass. 412, the trial judge directed a verdict for the defendant, there being no evidence that there was any negligence in procuring the switch which it was alleged caused the injury, or any defect in the switch which could have been discovered upon most careful inspection, and the ruling was affirmed.

In *Spicer v. So. Boston Iron Co.*, 138 Mass. 426, the rule finds illustration in a case where it was held the plaintiff should recover. There the injury occurred by reason of a defect in an "S" hook. The plaintiff proved by witnesses, how the hook looked after the break, and showed that there was a visible crack or flaw in the hook, above the flaw at the place of the rupture, and the court held the evidence tended to show that a careful inspection would have revealed the weakness of the hook, and therefore there was evidence of negligence on the part of the defendant to support the verdict. In *Duffy v. Upton*, 113 Mass. 544, the action was to recover for an injury caused to an employe by the breaking of a derrick with which he was at work. The plaintiff proved the injury and that the machine gave way, and the court directed a verdict for the defendant. The Supreme Court approved the ruling, saying: "It is not shown to have been caused by imperfection of machinery furnished by the master for the servant's use. The burden is on the plaintiff to show negligence, and this is not one of the cases where proof of the accident is *prima facie* evidence of negligence. The accident might have happened without the negligence alleged and the means of knowledge as to the cause of the injury was clearly within the plaintiff's reach." So we may say here, it was clearly within the power of plaintiff to have this car examined by

some person after the accident, and thus have shown what was the fault or defect.

Le Banon v. E. B. Ferry Co., 11 Allen, 312, is instructive for the distinction between cases like the one under consideration and cases where a presumption of negligence arises from the happening of the accident. The plaintiff asked the court to rule that, having proved due care on his part and the occurrence of the accident, the law would imply negligence on the part of the defendants and cast upon them the burden of proving that the accident happened without their fault. After pointing out that the rule asked by the plaintiff was applicable in such cases, as where trains, under the exclusive management of the company, ran off the track, where the same evidence which proved the injury done also proved the defendants' negligence or developed circumstances from which it must be presumed, this opinion says: "Upon recurring to the facts in this case, it appears that this accident might have happened without negligence on the part of the defendants, and that the means of knowledge as to the cause of injury were equally within the reach of both parties. The court, therefore, rightly declined to give the instruction asked for on this point."

A case directly in point is found in De Graff v. N. Y. C. & H. R. R. Co., 76 N. Y. 125. There plaintiff was in the employ of defendant as brakeman on a freight train; in applying a brake the chain broke and plaintiff was thrown from the car and injured. Plaintiff proved that a chain of the size of the one in question, if of the best material, would bear a strain of six times the amount of power that could be applied by plaintiff, but did not show the cause of the fracture or nature of the defect. There was a motion for a non-suit, which the trial court denied, and the case was reversed for that error. The opinion of Church, C. J., says: "There is an entire absence of evidence as to the nature and character of the defect, or the cause of the breaking. We may imagine several causes: *first*, from an original defect in the iron; or, *second*, in its manufacture; or, *third*, by reason of weakness and ordinary decay by use; or, *fourth*, by getting misplaced

on the trip on which the accident occurred. There is no evidence that ordinary care and observation would have discovered all or either of these defects if they had existed, and they (the jury) must have so found, as they could not have singled out a defect which ordinary care would have discovered, because the particular defect was entirely unknown." Again, he says: "It is argued that the jury might have found negligence from the fact that there was some defect, but negligence is not to be presumed, and it is apparent that the chain might have become weak from use, without being discoverable from an ordinary examination."

The opinion is long and the case well reasoned, and it is clearly shown, that in order to charge the employer, when such an accident happens, it must be shown that the defect is one which could be discovered by a proper inspection, even though, from the nature of the accident, it may be readily concluded that some defect did, in fact, exist. In the light of these authorities, and upon general principles of reason, the majority of this court are of the opinion that plaintiff wholly failed to prove an element essential to his right to recover and that the verdict for defendants was properly directed, and the judgment must therefore be affirmed.

Judgment affirmed.

GARY, P. J., dissenting. The appellant concedes that unless the evidence by him introduced, with all the inferences which a jury could justifiably draw from it, would support a verdict in his favor, the action of the court was not erroneous. The cases supporting that view of the law are cited by court and counsel in C. & N. W. R. R. Co. v. Snyder, 128 Ill. 655. The question upon this record is as to what inference a jury could justifiably draw from the evidence.

Whether, if in fact the brake which gave way was defective, the appellees exercised reasonable care when sending the appellant to work upon the car, in assuming, without any inspection, that a car sent by a railway company to their quarry for use, was in a safe condition, was a question of fact for a jury. Pa. Co. v. Frana, 112 Ill. 398. Now, the mere

fact that the brake gave way while being used as it was constructed to be used, was of itself *prima facie* evidence that it was defective. *Kearney v. London, etc.*, 5 L. R. Q. B. 411, and 6 L. R. Q. B. 759. There a brick fell off a wall and injured the plaintiff, which was held to afford, *prima facie*, a presumption that the proprietors of the wall had not used reasonable care. So the fall of a building, no tempest prevailing, and there being no external violence, is without explanation, evidence of negligence of the owner. *Mullen v. St. John*, 57 N. Y. 567. "Buildings properly constructed do not fall without adequate cause." The same principle is applied where a locomotive boiler exploded in *I. C. R. Co. v. Phillips*, 49 Ill. 234; S. C., 55 Ill. 194.

But it is supposed that as the particular defect in the brake which caused it to give way is not shown by the evidence in this case, it can not be presumed, and the jury would not be at liberty to infer that it was such a defect that it might, by the use of ordinary means and ordinary care, have been ascertained; and therefore omitting to inspect the brake, when perhaps nothing would have been discovered by an inspection, is not evidence of any negligence, as a consequence of which the appellee was injured; and *DeGraff v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 125, is cited. That case does not go that length. The plaintiff was a brakeman on a freight train from West Albany to Syracuse. The railroad had six men employed at West Albany to inspect freight trains, who were in the habit of examining the brakes. The brake had been successfully used three times on the same trip, and the chain broke at the fourth attempt to use it. From evidence of what a good chain ought to bear, and the fact that it broke, it was conceded that the jury might find that it was defective, but says Judge Church: "I have been unable to find any evidence that this chain was not perfect when it was put in, nor that proper care was not exercised in examination by the servants of the company, nor what was the cause of its failure, or whether such cause could have been discovered by the usual and ordinary means. I think the evidence is not sufficient to charge the defendant with a knowledge of such weakness, or any negligence or omission to examine."

Now the case shows that the railroad had in its service men, whose duty it was to examine; if they neglected their duty, it was, under the law of New York, neglect of fellow-servants, not chargeable by the servants injured upon the master; and the probability that the defect was discoverable was greatly lessened by the fact that the brake did not give way, as in this case, at the first attempt to use it, but after being three times successfully used on that trip.

In the case of the fallen building in 57 N. Y., without evidence of any specific defect in it, the court say: "The mind necessarily seeks for a cause for the fall. That is, apparently, the bad condition of the structure. This again leads to the inference of negligence which the defendant should rebut." The proof of negligence "may in such cases as the present be by presumption."

In the present case it is a fair presumption that inspection by a careful and competent man would have discovered the defect which caused the brake to fail. All inspections are based upon experience, that in the ordinary course of things defects, if they exist, are thereby discovered. The contrary hypothesis makes the use of machinery a matter merely of luck and chance. In effect it substitutes the fatalism of the Turk for the precaution of Christian nations.

Verdicts of juries are properly based upon probabilities; certainty in a great proportion of human affairs is not attainable. A bare preponderance of evidence in favor of the necessary hypothesis is sufficient to warrant a verdict: *Miller v. Balthasser*, 78 Ill. 302; and as the last quotation says evidence may be "by presumption," I therefore think the court erred in taking the case from the jury.

VILLAGE OF MORGAN PARK

V.

THOMAS GAHAN AND EDWARD BYRNE.

Pleading—Notice—Ordinance—Rescission of Contract—Jurisdiction of Appellate Court—Special Assessment—Mistake of Law—Deposit.

35	646
188s	515
35	646
57	280
35	646
156s	372
35	646
91	803
35	646
193s	4194

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1. A special count is never necessary in actions for money had and received.

2. An advertisement by a village for bids for work on a local improvement, to be paid for by special assessment, while it charges the bidders with notice of the ordinance providing for the improvement in question, does not affect them with notice of a subsequent ordinance providing the method in which the special assessment shall be levied.

3. Where an ordinance providing for a local improvement declares that it shall be paid for by special assessment, the passage of a subsequent invalid ordinance providing that the assessment shall be paid in ten annual installments, is such an attempt to change the proposed contract as will justify a bidder in refusing to execute it.

4. The statute which excludes from the cognizance of the Appellate Court "cases involving the validity of a statute," does not take away its jurisdiction to decide whether a statute has been repealed.

5. The act of March 17, 1874, which provides that water supply pipes may be paid for by assessments in annual installments not exceeding ten in number, and bearing interest not exceeding ten per cent, was repealed by implication by the act of April 29, 1887, which provides that special assessments for any local improvement may be divided into five annual installments bearing interest at six per cent.

6. The principle that money paid with full knowledge of the facts, but under a mistake of law, can not be recovered, does not apply to money deposited as security without any intention of the title thereto passing.

[Opinion filed May 14, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

MESSRS. CONSIDER H. WILLETT and FREDERICK S. MOFFETT, for appellant.

MESSRS. MASON B. LOOMIS and ALBERT H. VEEDER, for appellees.

GARY, P. J. June 9, 1887, the Village of Morgan Park passed an ordinance providing for the laying of water supply pipes on several streets of the village, the second section of which is, "that the cost and expense of said improvement shall be defrayed by a special assessment to be made in accordance with sections eighteen (18) to fifty-one (51) inclusive, in article nine (9) of the act," concerning cities and villages.

By a general ordinance of the village passed October 1, 1887, it was provided that all contracts (with an exception not necessary to notice here) for the making of any public improvements to be paid for in whole or in part by a special assessment, should be let to the lowest responsible bidder; that advertisements for bids should be made; that all proposals, when the bid was over \$500 and less than \$5,000 should be accompanied by a deposit of not less than five per cent of such bid, and when such bid was \$5,000 or over, not less than two per cent of such bid, which deposit should be forfeited to the village if the bidder should fail to execute a contract according to the proposal; and that where the improvement was to be paid for by special assessment, the contract should so provide, and the village should in no case be liable for such payment except from such special assessment, and that the contract should so provide. Sec. 49 of Art. 9, before referred to, provided that persons taking contracts from cities or villages, who agree to be paid from special assessments, shall have no claim upon the city or village except from the collection of such assessments.

The village advertised for proposals for the contemplated improvement to be received up to 8 o'clock P. M., of the 7th day of January, 1888, when they would be opened at the regular place of meeting of the board of trustees by the board. By a proposal dated January 7, 1888, the appellees bid for the work by the lineal foot, and though it does not appear how much the total would be, yet they deposited \$1,000, which is the subject of this suit.

They refused to enter into the contract their proposal required; demanded of the village a return of the money, which demand being refused, the appellees brought this suit. The declaration contains the common count for money had and received almost hidden among many that have no application to the case.

The appellant objects that if the appellees were entitled in any event to recover, the declaration should be special, advising them of the ground upon which the appellees claim the money. There is nothing in that objection. Ever since the

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case of *Moss v. Macferlan*, 2 Burr, 1005, was decided, it has been undisputed authority for this count in all cases where money received by the defendant ought to be paid by him to the plaintiff, however special the circumstances. 1 Chit. Pl. 351.

As to the merits on the facts as thus far stated, the appellees would not seem to have much of a case; but the further facts are that July 2, 1887, the village passed another ordinance providing that the portion of the estimated cost of the improvement provided for by the ordinance of June 9, 1887, which should be assessed upon property specially benefited, should be payable in ten annual installments, all of which, except the first, should bear interest at the rate of six per cent per annum. This the village assumed to do under "An act to provide for the laying of water supply pipes, by bonds and special assessment, payable in installments," of March 17, 1874, which did authorize cities and villages, whenever they should provide by ordinance for the laying of water supply pipes to be paid for by special assessment to "provide in such ordinance, or by an ordinance to be adopted at any time prior to the issuance of the warrant to the collector for collection of such assessment," that such assessment should be so payable in installments.

July 13, 1887, the County Court confirmed the assessment made under the ordinance of June 9, 1887, but whether a warrant for its collection was issued, the record does not show.

January 6, 1888, being the day before the proposal of the appellees, the village presented to the County Court a petition, asking that court to direct the issue of a warrant to collect the assessment in accordance with the ordinance of July 2, 1887. No action of the County Court upon this petition is shown by the record, nor any legislation referred to by counsel, under which that court could have acted upon that petition. If, however, there be no such legislation, the worst consequence of presenting the petition is that it was merely labor lost.

The record does not show any notice in fact to the appel-

tees of the ordinance of July 2, 1887, or of the petition of January 6, 1888, nor is there any presumption of law that the appellees had any knowledge of either the ordinance or petition when they made their bid. The advertisement for the proposals did state that a deposit must accompany the bid "subject to forfeiture, as provided by the village ordinances," that "the contracts will be made in accordance with the village ordinances and all proposals must be made with reference thereto," and that "payment will be made from special assessment moneys only." And it referred to specifications on file with the village as to the materials to be furnished and the work to be done.

Unquestionably, by the advertisement, a bidder was put upon inquiry of, and, therefore, was charged with notice of the terms of the ordinance by which the improvement was authorized, and of some ordinance or ordinances relating to village contracts and forfeiture of deposits. But when such a bidder had found the ordinance of June 9, 1887, and of October 1, 1887, the one providing for this improvement, and the other covering the subject of contracts with the village, there was nothing, so far as this record shows, to raise a suspicion in his mind that there could be anything else to affect his interest as such bidder. Now, treating the question as practical business men would look at it, the statement in Section 2 of the ordinance of June 9, 1887, that the costs and expenses of the improvement should be defrayed by a special assessment to be made in accordance with Sections 18 to 51 inclusive, in Article 9; which sections cover not only the making, but the collection of such special assessment; was a representation to one proposing to bid, that if he entered into a contract with the village, furnished the materials and did the work which the first section of the ordinance of June 9, 1887, called for, the village would pay him for it as soon as they could get the money by acting under Sections 18 to 51 inclusive, of Article 9; that even if the act of March 17, 1874, was in force, the village would not exercise the privilege which it conferred. If the appellees, before making their bid, had had notice of the ordinance of

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July 2, 1887, then the ordinance would have furnished no excuse for not complying with the bid they made with that knowledge, provided the ordinance was valid. But if the ordinance was invalid, then, if the village, by the ordinance and the petition to the County Court in pursuance of it, showed its intention to pursue a course which would result in a failure to collect the assessment, from the proceeds of which only the appellees were to be paid, common justice, as well as the law, would justify their refusal to proceed.

What reason operated upon the minds of the appellees, inducing their refusal to enter into a contract with the village, only appears from the testimony of one of them, that their attorney told them that the assessment was not in accordance with the law. What his objections to it were does not appear, and the course the case takes here, makes it unnecessary to consider the objections now urged to the assessment as originally made and confirmed by the County Court. For if it be correct to say that the original ordinance was a representation that the village would not avail itself of the privileges of the act of March 17, 1874, and that there being no evidence that the appellees, before making their bid, had notice that the village did not intend to abide by that representation, the appellees should, therefore, be presumed to have made their bid on the faith of that representation; then if the fact appears that the village did not intend to adopt the measures within its power to procure the means of paying for the materials and work, and which measures the original ordinance had represented that they would adopt, it is clear that the village can not retain money received by it under a representation so material to the interests of the appellees, and which the village had voluntarily falsified.

It is quite a different thing to a man putting his capital and labor into an enterprise, to have nine-tenths of his compensation put into annual installments, even with six per cent interest, from what it would be to receive the whole as soon as it could be collected by proceeding under the sections of Article 9, as the original ordinance, in effect, represented would be done. Nor were the appellees under any obligation

as a condition precedent to reclaiming their money, to remonstrate with the village and endeavor to induce it to retrace its steps or change its course.

The village received the money and claims a forfeiture upon a specific state of facts. If not entitled to a forfeiture upon those facts, it must restore the money, and when the parties are in *statu quo*, they may make a new bargain if they can agree.

Forfeitures are not favored by the law. A party insisting on a forfeiture must show that he was himself ready, able and willing to perform his part. *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Mix v. Beach*, 46 Ill. 311.

Although this view of the case makes it really unnecessary to decide whether the act of March 17, 1874, was in force in 1887, yet, if that act was not then in force, but had been repealed, the attempt by the village to proceed under it, makes the right of the appellees to refuse to enter into the contract still clearer.

The statute defining the jurisdiction of this court, and excluding therefrom "cases involving the validity of a statute," does not take away the jurisdiction to decide whether a statute has been repealed. *Cairo v. Bross*, 99 Ill. 521.

Now the act of March 17, 1874, had relation only to water supply pipes, and provided for payment of assessments by annual installments, not exceeding ten in number, and bearing interest not exceeding ten per cent, without in terms fixing the amount of the several installments, whether equal or unequal. By an act entitled, "An act to amend Article 9 of an act entitled 'An act to provide for the incorporation of cities and villages,' approved April 10, 1872, in force July 1, 1872, by adding thereto the following sections," approved and in force by an emergency clause April 29, 1887, it was provided, by language too long to quote at length, that any special assessment for any local improvement might be divided into installments, the first of which should not exceed twenty-five per cent of the whole and the residue should be divided into four equal annual installments bearing interest at six per cent. The intent of the Legislature is evident, that this

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amendment of Article 9 should be the whole law upon the subject to which it relates. The principle of uniformity as to legislation, taxation and legal proceedings has in this State become a part of the constitution.

That the same subject should be governed by inconsistent regulations, to be adopted as alternatives, is opposed to that principle; not that a statute is to be held invalid on that ground, but as that is the policy of the State, it may be looked to in ascertaining the legislative intention. But here the two statutes are not only inconsistent with, but repugnant to each other.

The last statute requires that the first installment shall not exceed twenty-five per cent of the assessment; that the residue shall be divided into four equal installments, and that they shall bear interest at the rate of six per cent.

Whatever may be said of the first and last of these requirements, the second is directly opposed, and in the particular in which the ordinance of July 2, 1887, followed the act of March 17, 1874, to the provision of the last named act, that the installments might be any number not exceeding ten. *Cairo v. Bross*, 101 Ill. 475, and cases there cited by counsel for Bross.

So the Supreme Court has recently held, in *Union Tr. Co. v. Trumbull*, 23 N. E. Rep. 355, that the amendment in 1887 of the eighth section of the act to establish Appellate Courts, by which amendment these courts "have jurisdiction of all matters of appeal or writs of error from the final judgments, orders or decrees on any of the County Courts," repeals Sec. 122 of the act of 1874, concerning appeals from County Courts to the Circuit Courts.

The principle that money paid with full knowledge of the facts, but under a mistake as to the law, can not be recovered, has no application to a deposit of money as security, the title to which is not intended to pass. If, therefore, the appellees had in fact had notice of the ordinance of July 2, 1887, and the petition of January 6, 1888, the result would not be changed.

The judgment must be affirmed.

Judgment affirmed.

WILLIAM B. LITCH

V.

EDWARD S. CLINCH ET AL.

35 654
136a 410

Res adjudicata—Set-off—D fault—Decree—Affirmative Relief—Mortgages.

1. A judgment against a defendant by default is not conclusive as to his right to recover on a claim pleaded by him as a set-off.

2. In order to establish as a set-off the plaintiff's liability to account for property of the defendant, which has been disposed of by plaintiff, it must be shown that the property was of some value.

3. Where a defendant in partition files a cross-bill asking to have a deed given by him declared a satisfied mortgage, and that it be canceled, and that an accounting be had between him and the mortgagee, the court may, if it finds the deed to be an unsatisfied mortgage, determine the amount due thereon, though no other affirmative relief is prayed for by the mortgagee.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Ogle County.

MR. WILLIAM B. LITCH, *pro se*.

MR. D. D. O'BRIEN, for heirs and executors of George W. Platt, deceased.

MORAN, J. A bill was filed in the Circuit Court of Ogle County for the partition of certain land in said bill described, and to said bill appellant and appellees were made defendants. After answering the original bill appellant filed his cross-bill, in which he alleged that he was indebted in 1873 to Edward S. Clinch and George W. Platt in the sum of \$1,100, to secure which indebtedness he gave to said Clinch on September 3, 1873, a quit-claim deed of the land described in the original bill, together with a house, lot and office in Ballston Spa, New York; that on said day Clinch and wife conveyed the land described in the original bill to George W. Platt, and in April, 1875, conveyed to one Nancy Wilber the house, lot

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and office in Ba'lston Spa. The cross-bill proceeds to allege that appellant had, in 1872, a suit pending in Boston against one Carnes, for legal services rendered in certain proceedings in reference to two certain lots of ground in New York City; that Clinch, acting for himself and for Platt, induced appellant to abandon said suit in Boston and turn over certain papers pertaining thereto to him, Clinch, to be used in a litigation which Platt had then pending in New York against Carnes, said Clinch agreeing for himself and Platt to pay for said papers, and appellant claims a large sum of money to be due to him therefor. The cross-bill further alleges that in December, 1881, appellant was sued by Platt's executors, Clinch acting as attorney, in the Marine Court of New York City for the said indebtedness, and that he drew and filed an answer in said Marine Court and employed one Clute, an attorney of New York, to defend said suit in said Marine Court. That in February, 1882, a judgment was recovered in said suit against appellant by fraud and deception, and in favor of said Platt's executors, for \$1,500, no one appearing for him in said suit at the time said judgment was rendered; that Clinch and said Clute fraudulently and corruptly colluded and conspired in getting said judgment, and designedly misled appellant as to the time said suit would be tried, and that appellant did not know there was such a judgment against him until suit was brought upon the same against him in Ogle county. That an action is pending against him in said Ogle Circuit Court on said judgment. Prays that said action be enjoined; refers to the exemplified copy of the record of the judgment of the Marine Court of the City of New York, all of which is to be considered incorporated in, and become a part of the said cross-bill. Prays that the court cancel of record said quit-claim deed of said land to said Clinch, and cancel the quit-claim deed from Clinch and wife to said Platt in his lifetime; and to render a decree against Clinch and the representatives of said Platt, and in favor of appellant for the balance found due to him after a full examination.

This cross-bill was answered by the heirs and executors of Platt, claiming the land conveyed in the deed from appellant

to Clinch, and described in the original bill in full, and denying that appellant had any interest therein; denying that they owe appellant anything whatever, and alleging that he has no defense to suit at law upon the judgment, and denying all fraud in obtaining the same. On the hearing the court found that the conveyance of September, 1873, from appellant to Clinch, of land described in the the original bill, and the lot, etc., in Ballston Spa, was by way of security for appellant's indebtedness to Platt, and that said Platt's executors had but a mortgage interest in said land, and that appellant was the owner thereof, subject to said mortgage; that the judgment in the Marine Court was for the same indebtedness that said land was conveyed to secure, and that in the suit in said Marine Court, appellant had claimed and set up in a plea of set-off, by him filed in said suit, that said indebtedness had been paid by the appropriation of the Ballston Spa lot, house and office, and that said set-off was not withdrawn, and the said matter was therefore *res adjudicata* by the judgment of said Marine Court. That there was nothing due to appellant for the use of the Carnes papers; that the indebtedness for which said Marine judgment was obtained, and the indebtedness to secure which the quit-claim deed of the land in the original bill described was given to Clinch, is one and the same indebtedness, and that there is due thereon, interest and principal, the sum of \$1,982.35, and that said executors of George W. Platt, deceased, have a mortgage lien on the interest of appellant in the land described in the original bill, and it was ordered that the cross-bill be dismissed.

From this decree the appeal is prosecuted and several errors are assigned.

The principal question in the case relates to the binding effect of the judgment of the Marine Court of the City of New York. It appears from the exemplified record thereof, that appellant filed in that suit a plea setting up by way of counter-claim or set-off against the indebtedness on the notes on which he was sued, a claim for the value of the Ballston Spa lot, house and office, which Clinch and Platt had conveyed to Nancy Wilber. When the trial came on appellant

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was not present to support his counter-claim, and was defaulted by the court, and judgment rendered against him for the amount due on the notes with interest.

The rule of law is that a judgment of a court having jurisdiction of the parties and the subject-matter, will conclusively bind the same parties and their privies, and will bar their calling in question in any subsequent action, the matter of claim or defense which were or could have been litigated in the action in which the judgment was rendered. *Gray v. Gillilan et al.*, 15 Ill. 453; *Harmon v. The Auditor, etc.*, 123 Ill. 122.

It is sometimes a question of nicety to determine what specific matters must be held to be concluded by the former judgment. Such matters of defense as were properly involved, though they may not have been presented by the pleadings, nor in fact raised or discussed on the trial, will be barred, because such matters the defendant is bound to present. But a set-off or counter-claim, the defendant is at liberty to present, or to withhold and make the basis of a new action, and the inquiry here presented is whether, where a plea of set-off is filed and is not withdrawn, and the record shows that no evidence was offered in support of it, the judgment will bar a subsequent claim for the matter set up in the plea. We do not regard this question as settled by any of the cases in which the doctrine of *res judicata* has been considered by our Supreme Court, nor do we find what we regard as direct authority on the point in any of the decided cases. In *Eastmure v. Laws*, 7 Scott's R., 461, it was held that a set-off not withdrawn became *res judicata* after the verdict and judgment had passed, though no evidence was given in support of the plea. There the record which was relied on as conclusive, showed nothing, one way or the other, as to whether evidence was introduced in support of the plea of set-off, but it was set up in a replication filed to the plea of *res judicata*, that no evidence was offered to the jury in support of the set-off, and the court held the replication bad.

The reasoning of the different judges would seem to support the conclusion that if the set-off is not withdrawn, the

judgment will be conclusive upon it, whether it was supported by evidence or not. We think, however, a distinction may be fairly taken between that case and this on the point that the record in this case shows affirmatively that no evidence was offered on the counter-claim or set-off. Though the plea may be on file, the matter can not be said to have been submitted to the court where no evidence was offered under it, and the record shows no judgment upon it, but in effect that it was not tried or submitted. We are inclined to the opinion that the record of the Marine Court shows no such determination of the matter in relation to the Ballston Spa house and lot, as precluded appellant from inquiring into that matter in this suit. *Burwell v. Knight*, 51 Barb. 267.

But this conclusion will not authorize the reversal of this decree. It appears from the evidence of Clinch that nothing was obtained by the conveyance of said lot, and appellant wholly failed to show by any competent evidence that it was of any value. Appellant was not a competent witness to prove that fact. The parties adverse to him in this issue were defending as the heirs and executors of Platt, deceased. Therefore, though the court may have been wrong in holding that the question of accounting for the value of the Ballston Spa lot was *res judicata*, yet the decree is right; for while appellant set up said matter in his cross-bill and claimed an account thereof, alleging the value to be \$1,500, he failed to introduce legal evidence to support such allegation, and the court could not do otherwise than reject the claim.

Appellant contends that the court granted to appellees affirmative relief without any pleading on their part justifying it, in that the court found that they were entitled to the sum decreed to be due them on the mortgage.

This contention can not be sustained. Appellant in his cross-bill set out the quit-claim deed to Clinch and the defeasance from him, constituting the transaction a mortgage, and alleged that said mortgage was satisfied, and nothing due to appellee thereon, but that on the contrary they were indebted to him, and asked the court to cancel the said mortgage. Appellees answered the cross-bill denying these allegations.

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Upon such pleadings it was, in this partition suit, the duty of the court to determine whether said transaction was a mortgage, and whether as it stood it was to be removed or canceled as a cloud on appellant's interest in the land, and appellant expressly prays that his indebtedness against the Platt estate and Clinch, and their indebtedness against him, should be inquired into, and a proper decree rendered in favor of the proper person or persons.

Appellant's contention that there was fraud and collusion in obtaining the judgment in the Marine Court against him, is not supported by the proof which he introduced, and there was no competent evidence to sustain his claim for the value of the papers in the Crane suit.

On the whole record, we think the decree of the Circuit Court supported by the evidence and free from material error, and the same will therefore be affirmed.

Decree affirmed.

COMMERCIAL UNION ASSURANCE COMPANY

V.

ARIANA E. SCAMMON, ADMINISTRATRIX.

Stipulation—Judgment—Waiver—Practice.

1. Under a stipulation to the effect that several cases shall be tried by the court without a jury, and that all cases after the first one tried shall abide the event of that case, both in the Circuit Court and on appeal, judgment should be rendered in all the cases according to the final decision in said first case.

2. After being refused judgment on one ground, taking it on another ground is no waiver of the party's right to judgment on the ground on which it was refused.

[Opinion filed May 28, 1890.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Mr. HENRY G. MILLER, for appellant.

Messrs. CHARLES F. WHITE and MARTIN L. WHEELER, for appellee.

GARY, P. J. This is one of the many cases mentioned in the title of the stipulation copied in Niagara Fire Insurance Company v. Scammon, 35 Ill. App. 582. All the questions in it, except the effect of that stipulation and the measure of damages, have been decided by the former decisions of this court and the Supreme Court cited in the Niagara case.

In the latter case the stipulation construed was a short paragraph annexed to the longer stipulation affecting this case. By reference to the Niagara case it will be seen that the parties agreed that all the cases should be tried by the court without a jury; that certain evidence should be used; that either party might offer additional testimony; that the first case tried should be No. 17; and "that the succeeding cases shall abide the event of said case, both in the Circuit Court, and on appeal to the Appellate Court and Supreme Court if any appeal be taken by either party."

As the stipulation contemplated the trial of but one case, the event of which the other cases were to abide, it is clear that the terms of it relating to the evidence to be used or offered, had reference only to the trial of that one case. Whether that was well or ill tried, by either party, the result as to the other cases would be the same. Whether one or all of the series of courts through which that case might go decided correctly or blundered, the other cases were to "abide the event" of that one.

It was a disinterested stipulation on the part of the attorneys. It diminished their labors, and their right to consequent compensation. It is not an unreasonable conjecture that when the first case had gone in favor of the insurance company in the Circuit Court, the several companies felicitated themselves and congratulated each other, that they were probably freed from the perils of a jury trial in an insurance case. What was meant by the words "abide the event?" Certainly not that

the same order of proceedings should be taken, step by step, in the succeeding cases as in the first. The parties had in view no such parrot-like repetition of forms without meaning, if the end was predestined. They meant the final outcome and the end of the litigation; that the side finally successful in the first case, should be successful in all.

Two reasons are now urged against giving this effect to the stipulation. The first reason was considered and held insufficient in the Niagara case, namely, that Judge Clifford, in refusing to enforce the stipulation, followed the decision of Judge Grinnell, when the plaintiff below moved before him for judgment upon the stipulation.

It is now said that the then plaintiff should, if he chose to insist upon a judgment upon the stipulation, have excepted to the ruling of Judge Grinnell and saved the question by a bill of exceptions. That ruling was merely interlocutory. It could be reviewed only if at that time there had been a final judgment for the company. The case being postponed, when it came on again for final disposition, the plaintiff must present anew the grounds upon which he claimed judgment. Without such action on his part, an exception to the ruling of Judge Grinnell would have availed him nothing. *Shedd v. Dalzell*, 30 Ill. App. 356.

When the court denied him judgment upon one ground, taking it upon another was no waiver of his right, if right he had to it upon the first ground, nor if he ought to have had the judgment upon the first ground, would errors, if any there were in the proceeding by which he obtained judgment, be any cause for the reversal of a judgment that he was entitled to without going through those proceedings.

But, say the appellants, the stipulation had fulfilled its purpose and was *functus officio*. The facts upon which they take this position are, that this stipulation was made at the April term, 1886. At that term the Circuit Court entered judgment in favor of the company in No. 17. May 3, 1886, this case was submitted to the court for trial without a jury, and the parties consented to judgment for the defendant as in No. 17, upon condition that if the judgment in No. 17 should be

reversed by this court, or the Supreme Court, then the judgment in this case should, on the application of the plaintiff, be vacated, and the case thereafter stand 'in all respects for a trial or proceeding in the same way and condition as if no judgment had been entered. How would the case have stood if that judgment had not been entered? The answer is, to abide the event of No. 17 here and in the Supreme Court. This court reversed the judgment in No. 17 and rendered a final judgment that Scammon should have and recover of the company \$8,910 and costs. That judgment the Supreme Court affirmed. See 20 Ill. App. 500; 125 Ill. 601; 126 Ill. 355.

November 15, 1888, was the date of the affirmance by the Supreme Court, and March 2, 1889, the Circuit Court vacated the judgment of May 3, 1886, in this case, and reinstated the case upon the docket. So far the acts of the parties had been consistent with, and ought to be understood as being in performance of this stipulation. If on appeal the judgment of the Circuit Court in No. 17 had been affirmed, there would have been an end of the litigation.

The recitals in the judgment of May 3, 1886, of the reasons for entering it, and the condition upon which it should be vacated, did not rescind the stipulation, but were manifestly *ex abundanti cautela* to avoid any question as to the power of the court to vacate, at some future term, the judgment then entered.

As the loss exceeded all the insurance that Scammon had upon the property, and as upon all of the questions as to change of title, the insurance by Babcock, the delay in the proofs of loss, the former decisions of this court and of the Supreme Court herein referred to, settle the right of the appellee to recover, the affirmance of the judgment in this case may be based upon the stipulation (C. & N. W. Ry. v. Hintz, 23 N. E. R. 1032) without reference to those decisions, or upon those decisions without reference to the stipulation.

Judgment affirmed.

INDEX.

ACCOUNT.

1. Whatever ground the party who is called upon to account has, upon which to resist the taking of such account, should be pleaded before the court under Sec. 6 of the act relating to actions of account, and upon an issue formed on such a plea, he is entitled to a trial by jury. *Garrity v. Hamburger Co.*, 309
2. Where a party has consented to the taking of an account he can not object to the auditor's examination of witnesses, books and the like, and inquiries made in order to ascertain the state of accounts between the parties involved. *Id.*, 309
3. In an action involving the settlement of accounts, this court holds, that the result arrived at was in accordance with the respective rights of the parties to the controversy; that the irregularities in the proceedings were consented to by defendant, and that the judgment against him must be allowed to stand. *Id.*, 309

ACTIONS.

1. The release of one of two wrongdoers, or the receiving of satisfaction from one of them, is a release or satisfaction as to both. *Vigeant v. Scully.* 44
2. A party injured by the joint wrong of several persons may elect to treat it as the separate act of each, but there can be but one satisfaction therefor. *Id.*, 44
3. Upon appeal from the judgment of a justice, the nature of the action is determined in the court to which the appeal is taken, by the evidence introduced at the trial, without any reference to what it may have been called in the justice court. *Steele v. Hill*, 211
4. If such case is tort, the amount of damages that may be recovered is limited to the amount of a justice's jurisdiction, and whatever the proof, the judgment must not exceed that amount. *Id.*, 211
5. In an action brought to recover the value of certain articles claimed by the plaintiff to have been stored with defendant, she alleging his refusal to deliver the same to her, this court declines, the evidence being conflicting, to interfere with the verdict in her behalf. *Id.*, 211

ADMINISTRATION.

1. This court declines to interfere with a decree dismissing a bill filed to set aside the probate of a will fifteen years after the same occurred. *Wheeler v. Wheeler*, 123
2. Upon a claim filed against the estate of a deceased person, the same being based upon services rendered parents of the deceased at his

ADMINISTRATION. *Continued.*

request, and upon his promise to pay therefor, this court holds that the statute of limitations did not apply to such portion of said claim as accrued more than five years before the filing thereof, for the reason that the evidence shows that it was the intention of the parties that deceased should be the depository of the earnings of the claimant, and that calls for payment were to be made to suit her convenience, and declines to interfere with the judgment in her behalf. *Waldron v. Alexander*, 319

3. This court declines to interfere with a judgment for the plaintiff, upon a claim filed against the estate of a deceased person, the same being based upon services rendered in the care of a third person at the latter's request, and upon his promise to pay therefor. *Waldron v. Alexander*, 328

4. As a general rule, an administrator takes no estate, title or interest in the real estate of his intestate, and the Probate Court can authorize him to sell it only by pursuing the statute governing such cases. *Young v. The People*, 363

5. The sureties upon an administrator's bond are not liable for moneys coming to his hand through an erroneous order of the Probate Court, he having no right as administrator to receive or retain the same. *Id.*, 363

AGENCY—See ATTACHMENT, 7, 8, 9, 11.

1. A bill of interpleader requiring two real estate agents to interplead as to which of them shall have certain commissions due upon the sale of a piece of land, each claiming to have made the sale, will not lie; the defense must be at law. *Sacksell v. Farrar*, 277

2. The fact that a contract made by an agent without authority, has been performed by the other party, can not, of itself, render the contract binding on the person for whom the agent assumed to act. *Koch v. Nat'l Building Ass'n*, 465

3. In an action brought to recover commissions alleged to have been earned in making a sale of certain real estate in pursuance of authority in writing, this court declines, in view of the evidence, to interfere with the judgment for the defendant. *Farrar v. Brodt*, 617

AMENDMENT.

1. The objection that a suit was brought by the wrong party may be removed by amendment in the trial court. *Madderom v. Heath & Milligan Mfg. Co.*, 588

APPEAL AND ERROR—See ACTIONS, 3; CREDITOR'S BILL, 1; CRIMINAL LAW, 2; INSOLVENCY, 5; INSTRUCTIONS, 1; MASTER AND SERVANT, 7; PRACTICE.

1. This court holds as erroneous an order dismissing an appeal from a justice court for the reason that an order entered at the same term the justice's transcript was filed in the trial court, upon appellants, to file an affidavit of merits, was not complied with. *Jensen v. Fricke*, 23

2. A harmless error is no cause for reversal. *Butler Paper Co. v. Regan Printing Co.*, 152

APPEAL AND ERROR. *Continued.*

3. Where counsel has obtained the ruling of the court that proof sought to be introduced is incompetent, and has saved his exception, he need not press the question further in order to preserve the error. *Mackin v. Blythe*, 216
4. The remedy for the correction of any error in a final order of the Probate Court is by appeal. *Blair v. Sennott*, 368
5. The fact that an appeal bond is given by only one of two joint appellants, though cause for dismissal of the appeal, will not prevent the court from considering the errors assigned where there is no motion to dismiss. *Frank v. Thomas*, 547
6. Where an appeal is taken by filing the bond with the clerk of the court appealed to, the appellee must be summoned, or appear, or two *nihilis* be returned before the court can proceed, and if one of two or more defendants, against whom judgment has been entered, appeals, there must be summons to those not appearing, and without a transcript on file the court can not proceed. *Norton v. Coggsawell*, 566
7. This court declines to consider the appeal in the case presented, there being no assignment of errors. *Waizel v. Harrison*, 571
8. On appeal from the judgment of a justice, the defendant is not required to file an affidavit of merits in the higher court until the cause is reached for trial. *Reedy v. Cisler*, 572
9. The statute makes no distinction in this respect between an appeal perfected by entering into bond before the clerk of the Circuit or Superior Courts, and one where the bond is approved by the justice. *Id.*, 572
10. Error can not be assigned on matter on which the trial court has not ruled, and to which that court's attention has not been called. *Alley v. Limbert*, 592

ASSAULT—See DAMAGES, 1; TRESPASS, 4.

1. The mere snatching of a paper from another amounts to a technical assault, and, though no injury follows, will justify the recovery of damages. *Dyk v. De Young*, 138
2. A person entitled to an article withheld by another, should request its return before attempting to take it by force. *Id.*, 138
3. In an action brought by a married woman for the recovery of damages for injuries occasioned by an assault, this court declines, in view of the evidence, to interfere with the verdict in her behalf. *Id.*, 138

ASSESSMENTS.

1. The act of March 17, 1874, which provides that water supply pipes may be paid for by assessments in annual installments not exceeding ten in number, and bearing interest not exceeding ten per cent, was repealed by implication by the act of April 29, 1887, which provides that special assessments for any local improvement may be divided into five annual installments bearing interest at six per cent. *Village of Morgan Park v. Gahan*, 646

ATTACHMENT—See INSOLVENCY, 1; JURISDICTION, 3.

1. It is the rule in New York that an assignee by operation of law

ATTACHMENT. *Continued.*

can not supersede an attachment lien acquired by a creditor of an insolvent, although the assignment was made before the lien was acquired, the creditor and insolvent both being residents of the State. *U. S. Express Co. v. Smith*, 90

2. This court declines to interfere with the judgment of the trial court wherein it finds that certain goods, when attached, were rightfully in the possession of another under a bill of sale. *Ditto v. Sharpe*, 132

3. Upon attachment proceedings based upon a debt not due when the suit was commenced, this court, in view of the evidence, declines to interfere with the judgment for the defendant. *Butler Paper Co. v. Regan Printing Co.*, 152

4. This court holds as proper, the employment of certain solicitors in chancery proceedings involving the parties to the case presented. *Id.*, 152

5. A voluntary assignment with preferences, made in another State by a resident thereof, is not operative to convey the title to property in Illinois, as against creditors of the assignor residing in this State who are seeking by attachment in the courts here to subject such property to payment of their debts. *Henderson & Co. v. Schnas*, 155

6. In the case presented, this court holds that the presentation of plaintiff's claim to defendant's assignee in Montana and the receipt of a dividend thereon, did not estop them from prosecuting an attachment suit instituted in this State, and that the judgment against them can not stand. *Id.*, 155

7. The mere fact that a person is acting as the agent of another in the collection of a debt, does not render the latter liable for his maliciously suing out an attachment. *Oberne v. O'Donnell*, 180

8. The agent in such case is alone liable unless it can be shown that the principal in some manner aided, abetted, advised or consented to, or adopted or ratified such act. *Id.*, 180

9. While a principal may render himself liable for the tort of his agent by receiving and appropriating the fruits thereof, in order that such appropriation shall amount to a ratification so as to charge the principal, it is indispensable that he shall be shown to have had full knowledge of all the material facts and circumstances of the tort. *Id.*, 180

10. In an action brought to recover damages for the malicious suing out of, and levying an attachment on the property of the plaintiff, this court holds, that in view of the giving of erroneous instructions touching the rule of liability of principals for the torts of their agents, the judgment in her behalf can not stand. *Id.*, 180

11. In attachment proceedings involving a car load of flax seed, a third person claiming title thereto, it being shown that contracts had been entered into between him and the defendant touching advancements upon consignments, this court holds that the action in the premises of the bank named, was simply as agent for the intervenor, its president, whose private means were alone involved; that the cancellation of the draft referred to, by charging the same to defendant, cut no figure, as

ATTACHMENT. Continued.

under one of the contracts previously entered into, the seed was the property of the intervenor while he remained in possession thereof, and until advances were paid; that the drawing of the draft was merely a method of carrying out such contract; and declines to interfere with the judgment in his behalf. *Rumsey v. Nickerson*, 188

12. The requirements of the statute concerning attachments that notice to a defendant upon whom personal service can not be had, shall be published in a newspaper, and a copy thereof mailed to him, are jurisdictional, and the record must affirmatively show jurisdiction where it is based upon publication, or it is void collaterally. Mailing in such cases is as indispensable as the publication. *Baldwin v. Ferguson*, 393

13. An affidavit setting forth that a defendant's residence two years before the making thereof, was at a place from which he had departed, is no evidence that his residence is there at the time the affidavit is made. *Id.*, 393

14. A judgment is void as to a person made a party defendant to attachment proceedings subsequent to the institution thereof, an amended affidavit but no bond being filed. *Id.*, 393

15. In order to justify taking goods out of the hands of a third person, under a writ of attachment, it must be shown that the attachment was based on a valid debt. *Matson v. Taylor*, 549

16. The rights of attachment creditors can not be settled on petition by an assignee in the County Court, where the attachments were levied before he took possession. *Lowe v. Matson*, 602

BAILMENTS—See ACTIONS.

BANKS—See ATTACHMENT, 11; NEGOTIABLE INSTRUMENTS, 11, 12, 16, 17, 18.

BASTARDY..

1. In bastardy proceedings this court declines to interfere with the verdict that defendant was the father of the child in question. *Curran v. People*, 275

2. In cases of this character no transcript of any proceedings before the justice need be filed; only the warrant for the arrest and the bond for the appearance are required; neither need the complaint be in writing; and the admission of evidence as to the attention to complainant of other men is proper. *Id.*, 275

BILLS OF EXCEPTIONS—MANDAMUS, 1; PRACTICE, 9, 10, 25, 30, 42.

1. An amendment to a bill of exceptions made solely on the recollection of the trial judge and filed after the end of the term and after the time allowed for filing exceptions, is void. *Roblin v. Yaggy*, 537

2. Where a case is tried by the court and the bill of exceptions shows no exception to the finding or the judgment, no motion for a new trial, no submission of any proposition of law to the court, and no exceptions to the rulings on evidence, there is no question for review on appeal. *Id.*, 537

BILLS OF EXCEPTIONS. *Continued.*

3. Where the error is shown by the record, no bill of exceptions is necessary to present it herein. *Norton v. Coggsweil*, 566

4. The only way to preserve a motion for a new trial, and the reasons therefor, so that they may be seen by the court upon review, is to embody the same in the bill of exceptions. This court will not look elsewhere to find matter which can only become part of the record by becoming so embodied. *Alley v. Lemberst*, 592

5. The bill of exceptions is the pleading of the party filing the same, and is to be taken against him, and unless error is made to appear, the action of the trial court must be presumed to be correct. *Id.*, 592

BONDS—See ADMINISTRATION, 5.

1. This court holds that an heir can not maintain an action upon a bond filed on an appeal from a judgment in an action of forcible detainer, to recover the damages accruing after the death of the obligee therein, who was the father of the plaintiff, and before the surrender of possession of the property in question. *Keegan v. O'Callaghan*, 142

CARRIERS—See RAILROADS.

CERTIORARI.

1. No question of *laches* is involved upon the issuance of a writ of *certiorari* at any time during the period prescribed by the statute. *Graff v. Smolensky*, 264

2. A judgment of the Probate Court touching matters of which it has jurisdiction can not be reviewed by *certiorari*. *Blair v. Sennott*, 368

CONFLICT OF LAWS—See JUDGMENTS AND DECREES, 1.

CONTEMPT.

1. A contempt is a criminal offense, and a sentence of imprisonment for a contempt is a judgment in a criminal case. *Rawson v. Rawson*, 505

2. Such an offense not being punishable in the penitentiary is a misdemeanor. *Id.*, 505

3. Proceedings of this character should be in the name of the people. *Id.*, 505

4. Where an order for commitment for contempt constitutes the entire record, it is the duty of the court making the same, to set out fully therein in what the contempt consisted, in order that an appellate court may see whether the judgment was warranted. *Id.*, 505

5. The order for commitment of a person guilty of contempt in the presence of the court, should show that the defendant was in court when judgment was entered. *Id.*, 505

6. This court has authority to review judgments of courts of record in contempt cases. *Id.*, 505

CONTRACTS—See ADMINISTRATION, 3; EVIDENCE, 25; MUNICIPAL CORPORATIONS, 1.

1. Where express words in a contract fairly and legitimately require an inference as to their intention, the intention thus inferred is

CONTRACTS. *Continued.*

just as truly a part of the contract as the clearly expressed undertaking. *Grimley v. Davidson*, 31

2. Upon a bill filed to prevent a neighboring land owner from constructing openings in an extension of a party wall, and placing windows therein, this court holds that the agreements of complainant, as set forth in a certain written contract signed by him and the defendant, were based upon a valuable consideration, and that his intention to allow the making of such windows, and the preservation thereof, free from any obstruction of the light, is plainly discoverable therefrom. *Id.*, 31

3. In an action by commission merchants to recover an amount claimed to be due for commissions and money paid, the fact being that a sum was previously paid by a third person for defendant to plaintiffs, who thereupon delivered to his attorney a receipt in full, this court holds that, notwithstanding the execution and delivery thereof, it was admissible for the plaintiffs to show that by a previous agreement between themselves and the defendant, the receipt had no effect as to them; that it was never intended as a contract but was made for another purpose. *Counselman v. Collins*, 68

4. The construction of the parties to a contract as gathered from their acts will be regarded by courts in construing the same. *Hall v. First Nat. Bank of Emporia*, 116

5. When a party agrees to accept and pay drafts for cattle bought and consigned to him, without requiring a bill of lading to be attached, he, and not the party who in good faith advances money on a draft, relying on such promise, takes the risk of the stock being diverted while in transit either by accident or design. *Id.*, 116

6. In an action brought by a bank to recover from a firm of commission merchants upon an alleged promise by them to accept and pay a certain draft drawn upon them by consignors of cattle, the same having been discounted by the plaintiff, this court holds, that the drawing of the draft in question was duly authorized; that the fact that the cattle against which it was drawn were diverted after shipment to another market cuts no figure in view of the fact that it did not appear there was any design in substituting other cattle, which sold for more than the draft called for, and declines to interfere with the verdict for the plaintiff. *Id.*, 116

7. A plaintiff in a given suit promising to dismiss the same, upon the receipt of a valuable consideration therefor, is bound thereby. *Graff v. Smolensky*, 264

8. All oral negotiations and agreements between parties, which precede the reduction of their contract to writing, will be treated as merged in the writing, and where a writing expresses certain things to be performed by one party upon a consideration moving from the other, it is not competent to prove by parol that some other thing, in addition to those stated in the writing, was also, and before or at the time of the making of the writing, agreed to be performed upon the same consideration. *Corel v. Benjamin*, 297

CONTRACTS. *Continued.*

9. Evidence is admissible to show that part only of a contract was reduced to writing, and parol evidence may be introduced to supply the rest of the agreement. *Id.*, 297

10. Upon a contention touching the assignment of interests in certain patent rights, it being claimed by the assignee that a certain written contract did not fully express the arrangement between the parties, and that the subsequent assignment to him of certain claims against third persons named, was upon the same consideration as the agreements and undertakings contained in the said written contract, this court declines to interfere with the decree of the trial court, holding that said written contract contained the whole agreement of that date, and that at that time no agreement to assign said claims was entered into. *Id.*, 297

11. Where a contract is in writing it is for the court to state its meaning, and it is only where there is a doubt as to its proper meaning, arising from the ambiguity of the words or phrases used, that the acts of the parties are looked to for aid in the construction thereof. *Davis v. Sexton*, 407

12. Contracts will not be so construed as to compel the proof of a negative unless that appears to be the express intention to the parties thereto. *Chicago City Ry. Co. v. Blanchard*, 481

13. Clauses in contracts of service in the nature of forfeitures must be strictly construed. *Id.*, 481

14. When parties put their agreements in writing it becomes the exclusive means of proving what they have agreed to, unless it can be shown that there was a mistake in the writing by inserting or omitting words or clauses. The words of the writing being such as the parties agreed upon, neither party can claim that they do not mean what he supposed, even as a defense. *Hair v. Johnson*, 562

15. Upon a bill filed for the purpose of obtaining a certain share of the profits arising out of the construction of a viaduct in conformity with a certain contract in writing, the defendant contending that said contract contained a mistake, and praying that the same be reformed, this court declines, in view of the evidence, to interfere with the decree denying such request. *Id.*, 562

16. The law does not permit any word in a contract to be without meaning where one may be reasonably assigned to it. *Hennessey v. Gore*, 594

CORPORATIONS—See CREDITOR'S BILL, 3; INSOLVENCY, 15.

1. The payment of an assessment upon corporate stock with knowledge of facts which would warrant a rescission of the subscription thereto, amounts to a waiver thereof. *Great Western Tel. Co. v. Bush*, 213

2. In an action brought to collect an installment upon an alleged subscription to the capital stock of a telegraph company, this court reverses, in view of the giving of an erroneous instruction in behalf of the defendant, taking in effect the whole case from the jury and ignoring the question of waiver. *Id.*, 213

CORPORATIONS. *Continued.*

3. It seems that a subscription to capital stock, after the whole has been subscribed for, will not bind the subscriber. *Id.*, 213
4. No device will free a holder of corporate stock purchased from a corporation for a percentage of its nominal value from his obligation to creditors to pay the residue. *Alling v. Wenzell*, 246
5. A subscription for corporate stock upon which nothing was paid is revocable by consent of the parties concerned, before the corporation begins to do any business, and before any interests of third persons to be affected by such revocation attach, and the persons so surrendering are not assignors to the persons who afterward buy the stock from the corporation, and therefore not jointly liable with them under Sec. 8, Chap. 32, R. S. *Id.*, 246
6. In proceedings involving the winding up of a corporation, this court holds that the dissolution can not be complained of, in view of the fact that it had ceased business and its assets were exhausted; that proceedings in cases of this character must be ambulatory until complete satisfaction or total insolvency has left nothing to be reached; and declines, in view of the evidence, to interfere with decrees to this end. *Id.*, 246
7. The president of a corporation has not, as a matter of law, and merely by reason of his holding such office, power or authority to execute deeds, mortgages or leases of the real estate thereof. *Koch v. Nat. U. Building Ass'n*, 465
8. The presumption that an act done by the president of a corporation is legally done and binding upon it, arises only in the absence of legislative enactment or provision made in its by-laws, touching the subject-matter of the act in question. *Id.*, 465
9. The president of a corporation may perform all acts which are incident to the trust reposed in him, such as custom or necessity has imposed upon his office, without express authority. *Id.*, 465
10. Upon a bill filed for a specific performance of an alleged agreement by the president of a corporation owning a certain building, to renew a lease, this court declines, in view of the fact that such officer did not have authority to grant such renewal, to interfere with the decree dismissing the same. *Id.*, 465

COSTS—See EQUITY, 1.

CREDITOR'S BILLS.

1. Upon a creditor's bill, seeking to reach property in the hands of third persons, alleged to belong to a judgment debtor, no proof being offered by the complainant in support of the allegations therein of the recovery of a judgment, and the issuance of an execution and the return thereof unsatisfied, it being claimed by him that the existence thereof was admitted on the hearing by the counsel for the defendants, no such admission being found in the record, this court declines, in view of the absence of proof touching these points, to interfere with the decree for the defendants. *Beidler v. Douglas*, 124
2. Upon a creditor's bill filed for the purpose of reaching funds

CREDITOR'S BILLS. *Continued.*

alleged to be due from defendants to a third person, said bill calling for answer under oath as to whether payment had been made by defendants for certain goods purchased by them from such third person, and if so, in what manner, this court holds, that the answer alleging payment is evasive and not responsive to the interrogatory; that the form of the oath makes the whole answer on information and belief, there being no way of distinguishing between the matters so stated, and those of which defendants had knowledge; that the answer is only to be treated as a pleading setting up affirmative matter of defense to be duly proved; that the evidence does not justify the claim of payment, and declines to interfere with the decrees in behalf of the plaintiffs.

Deimel v. Brown.

303

3. Upon a bill filed to compel the defendant to pay the complainants the amount due them upon a judgment recovered by them against a mining company, a corporation organized under the laws of another State, it being contended by them that said defendant owned stock in said corporation which had not been paid for, to an extent more than sufficient to pay said claim, this court holds, that under the statute of said State, no personal liability existed on the part of the defendant, and that the decree against him can not stand. *Farwell v. Wadsworth.*

469

CRIMINAL LAW—See CONTEMPT.

1. Proceedings under Secs. 84 and 278, of the city and village act, touching the arrest of persons disturbing the peace, or found violating a municipal ordinance, or the criminal law of the State, must be in the corporate name; such actions are of a civil nature in the form of debt, and are governed in all respects by the rule of procedure in civil cases.

City of Chicago v. Kenney.

57

2. An appeal to the Criminal Court in such cases brings the parties theretofore it, and its duty is to hear and determine the matter on its merits; such appeal is not to correct some error of law, but is to obtain a trial *de novo*, and the court has no power to determine whether the justice, before whom the case was originally brought, had jurisdiction of the subject-matter until the evidence is heard. *Id.*

57

3. Debts embraced in that clause of the State constitution touching imprisonment for debt, are those arising *ex contractu*, and do not include fines or penalties arising from violations of penal laws. *Id.*

57

4. The fact that a check is post-dated, or payable at a future day, does not take a given case out of the statute touching the obtaining of goods under false pretenses, nor does a merely colorable deposit shield the culprit. *Barton v. The People.*

573

DAMAGES—See EVIDENCE, 22; LANDLORD AND TENANT, 5, 6, 7, 8, 9; NUISANCES, 1.

1. The mental sufferings of the person injured should be considered in assessing damages in actions brought to recover for personal injuries caused by the negligence of another. *City of Chicago v. McLean.*

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DAMAGES. *Continued.*

2. There is no rule of damages in actions brought to recover for the death of young children occasioned by the negligence of others. *C. M. & St. P. Ry. Co. v. Wilson*, 346
3. Courts will review the findings where deceased had attained such an age that the value of his life to the next of kin becomes the subject of evidence. *Id.*, 346
4. Where a cause of action exists, at least nominal damages will be presumed and must be allowed, and the fact that the plaintiff in a given case insisted upon substantial damages, and neither tried his case upon a claim of, asked for, or would have been satisfied with nominal damages, can not alter the rule. *Van Velsor v. Seeberger*, 598

DECEIT.

1. The purchaser of a house must be assumed to have knowledge of such faults therein as are not concealed or covered up, but are open to view or discoverable upon ordinary inspection. *Van Velsor v. Seeberger*, 598
2. A highly exaggerated or even false description by a vendor of an article which is present and open to the inspection of the vendee, does not amount to such a misrepresentation as will support an action for deceit. *Id.*, 598

DEPOSIT.

1. The principle that money paid with full knowledge of the facts, but under a mistake of law, can not be recovered, does not apply to money deposited as security without any intention of the title thereto passing. *Village of Morgan Park v. Gahan*, 646

DIVORCE.

1. Upon the facts presented, this court declines to interfere with an order entered in an action for separate maintenance awarding a temporary allowance for support of the wife, and a sum for solicitor's fees. *Zoellner v. Zoellner*, 404
2. A wife is not bound to abandon home, means of support and children by a former marriage, and join her husband in another place, it not appearing that he is engaged in any business, or that he has provided a home for her therein; and her refusal to do so, constitutes no ground for a divorce in proceedings instituted by him upon the plea of desertion. *Phelan v. Phelan*, 511
3. Adultery of the wife after divorce is no ground for vacating a previous order allowing her permanent alimony. *Cole v. Cole*, 544
4. The authority of a court to vacate the order for alimony can not be questioned, upon a showing of sufficient cause. *Id.*, 544
5. This court declines to interfere with a decree holding that so long as the custody of the child in question continued with the mother under the original decree awarding the same, her right to the amount awarded by that decree for his support likewise continued. *Umlauf v. Umlauf*, 624
6. A decree in such case, that children shall not be removed out of

DIVORCE. *Continued.*

the county in which they reside, is in accord with the direction of the Supreme Court, that both parents "shall have the privilege of visiting and freely communicating" with the same. *Id.*, 624

DRAM SHOPS.

1. In an action brought by a widow against a saloon keeper and the owner of the building in which the saloon was located, for the recovery of damages alleged to have been suffered through loss of her means of support, by reason of the death of her husband while under the influence of liquor purchased in said saloon, this court holds, that the fact that during his lifetime her minor children had contributed money toward her support cut no figure, it not appearing that such gifts, in addition to her husband's contributions, did more than support her in the manner to which she was entitled in view of her husband's condition in life. *McMahon v. Sankey*, 341

ELECTION—See ACTIONS, 2.

EQUITY—See TRUSTS.

1. It is well settled as a general rule in courts of equity, that where one person institutes legal proceedings for himself and others, and thereby secures a fund for the common benefit of all, an allowance will be made to him for costs and expenses necessarily incurred. *Kadish v. Chicago Co-operative Brewing Ass'n*, 411

ESTOPPEL—See ATTACHMENT, 6; FORMER ADJUDICATION, 3; WAREHOUSE, 2.

EVIDENCE—See APPEAL AND ERROR, 3; CONTRACTS, 8, 9, 14; INSURANCE, 2; MECHANIC'S LIEN, 7; NEGOTIABLE INSTRUMENTS, 1, 2, 3, 4; PERSONAL INJURIES, 11; PRACTICE, 11, 31; RAILROADS, 2.

1. A declaration of a fellow-servant, subsequent to an injury, that he was responsible therefor, is not admissible as a part of the *res gestæ* in an action by a servant to recover for personal injuries upon the ground of his master's negligence. *Hellmuth v. Katschke*, 21

2. The rule that parol testimony can not be received to contradict, vary, add to, or subtract from the terms of a valid, written instrument, is not infringed by proof of any collateral, parol agreement which does not interfere with the terms of the written contract, though it may relate to the same subject-matter. *Millers' Nat. Ins. Co. v. Kinneard*, 105

3. Where a plaintiff introduces letters of the defendant to prove certain facts, he is bound to admit declarations therein which make against him, as well. *Bailey v. Pardridge*, 121

4. The refusal to allow a boy ten years old to testify is proper, no statement being made as to what was expected to be proved by him, and no question having been propounded to him from which the same could be inferred. *Corcoran v. Poncini*, 130

5. A witness should not be so examined that his answers will relieve the jury from considering the matters of fact submitted to them. *C. & E. I. R. R. Co. v. Roberts*, 137

6. A husband should not be allowed to state, upon trial of a suit

EVIDENCE. *Continued.*

brought by him to recover for the death of his wife alleged to have been occasioned through another's negligence, the value per annum of her services to himself and their children. *Id.*, 137

7. In the absence of an exception thereto, the admission of improper testimony can not be complained of. *Chi. Warehouse, etc., Co. v. Ill. Pneumatic Tool Co.*, 144

8. That one at the office of a party to a suit is pointed out as the party himself, is *prima facie* evidence of identity. *Edmanson v. Andrews & Co.*, 223

9. It being shown that under the postoffice regulations the sender of a letter may, before delivery thereof, regain possession of the same, the presumption will be, in the absence of evidence to the contrary, that such possession in a given case was through lawful means. *Buehler v. Gall*, 225

10. This court will take judicial notice of postoffice regulations. *Id.*, 225

11. This court holds that the evidence introduced in the case presented, warranted the allowance of the sum provided for in a trust deed as attorney's fee in case of foreclosure. *Magloughlin v. Clark*, 251

12. In the case presented, this court holds, that parol evidence introduced to show that the judge in question was not requested by the county judge of Cook county to hold the court, and that a certain order was not entered while presiding as judge, can not properly be considered in view of the fact that the record shows that he was properly presiding therein. *Baker v. Singer*, 271

13. A book of account undeniably mutilated is not entitled to credit. *Deimel v. Brown*, 303

14. A question, the answer to which would not be relevant to the issue, should not be asked. *Grubey v. Nat. Bank of Illinois*, 354

15. Nor should a question as to a witness' understanding, based upon a certain conversation; the witness must give a narration of the facts, and any conversation testified to must be given in the words, or the substance thereof stated. *Id.*, 354

16. Nor as to whether a third person made a report as to certain transactions, without stating when, nor where a question is hearsay. *Id.*, 354

17. Upon cross-examination a witness may be asked any question tending to impeach his impartiality in a given transaction, and he will not be excused from answering unless he claims the privilege on the ground that he will, by so doing, expose himself to punishment; and mere disgrace without danger of punishment is not enough to so excuse him. *Moline Wagon Co. v. Preston & Co.*, 358

18. In the case presented, this court holds that the trial court erred in sustaining an objection to a question asked a witness upon cross-examination, the same being relevant to the cause on trial, as tending to show whether the witness was under peculiar obligations to the party calling him, and that the fact that a certain bargain might have been

EVIDENCE. *Continued.*

proved by other witnesses did not cure the erroneous exclusion of testimony offered. *Id.*, 338

19. While a jury is required to act on the preponderance of evidence, a preponderance for the appellant is not, in a court of review, ground for reversal. *Penn Co. v. Backes*, 875

20. The statement of counsel in his opening as to a certain matter not be looked upon as evidence. *Id.*, 875

21. Expert evidence should not be received as to the meaning of a condition in a contract, to understand which no previous study or habit is necessary. *Lord v. Owen*, 382

22. In an action brought for the recovery of damages for the breach of a contract relating to the manufacture and sale of a patent medicine, this court holds, in view of the introduction of improper evidence, touching the meaning of a certain term therein, and as a basis for estimating damages, evidence as to the sales and profits before the making thereof, that the verdict for the plaintiff can not stand. *Id.*, 382

23. Where evidence is admissible for some, but not all purposes, the same should not be excluded from the jury. If it is apprehended that they would be misled thereby, the danger should be obviated by proper instructions. *Marder, Luse & Co. v. Leary*, 420

24. It is the rule in this State that evidence of the subsequent improvement of that portion of given premises which caused a personal injury, is admissible in actions brought for the recovery of damages therefor. *Id.*, 420

25. Whether upon the evidence a certain agreement amounted to the abrogation of a previous contract is a question of fact for the jury. *Cartier v. Troy Lumber Co.*, 449

26. Evidence of a conversation by telephone between plaintiff and some one at defendant's place of business, is not admissible as against the defendant, in the absence of proof as to who was the person with whom plaintiff talked. *Obermann Brewing Co. v. Adams*, 540

27. Secondary evidence of a letter sent to the opposite party, is not admissible where no notice to produce the letter has been given. *Id.*, 540

28. Both court and jury will take notice of general business usages. *Barton v. People*, 573

29. In an action brought for the recovery of damages for personal injuries alleged to have been occasioned through defendant's negligence, this court holds as erroneous, the exclusion of evidence proffered by the plaintiff, touching the relations of the two defendants, and the action of the trial court in deciding, by a peremptory instruction to find for the defendants, certain questions which should have been submitted to the jury with proper instructions. *Krueger v. Thiemann & Brand Brewing Co.*, 620

30. A witness should not be permitted to state his inference or conclusion from a given state of facts, which it is the province of the jury to draw for themselves. *Nat. Gas Light & Fuel Co. v. Miethke*, 629

31. Where a question relates to some branch of science, or some par-

EVIDENCE. *Continued.*

ticular art in which the witness is shown to have attained skill by study and experience, his opinion may be received. *Id.*, 629

EXEMPTIONS.

1. Upon the petition of a debtor in custody to be released, the same setting forth an offer to deliver up his property, it is necessary for him to make a schedule thereof, even if it be exempt from execution. *Stricker v. Kubusky*, 159

FORCIBLE DETAINER—See BONDS.

FORECLOSURE—See EVIDENCE, 9.

FORMER ADJUDICATION—See JUDGMENTS AND DECREES, 5.

1. In an action for damages alleged to have arisen through the negligence of an architect in failing to properly supervise the construction of certain buildings, this court holds that the verdict for the plaintiff in an action heretofore brought by the contractor, whose work was claimed to have been defective, to recover from the plaintiff an amount alleged to be due, precludes recovery by the latter in the case presented. *Vigeant v. Scully*, 44

2. The failure to present a given defense does not preserve the right to open the litigation in another forum. The principle of *res adjudicata* extends not only to questions of fact and of law, which were decided in a former suit, but also to the grounds of recovery or defense, which might have been, but were not presented. *U. S. Express Co. v. Smith*, 90

3. A ruling upon a motion, which is final, is appealable, and the same may be interposed as an estoppel, no appeal having been taken, when the matters decided are again sought to be made the subject of controversy. *Kaufman v. Schneider*, 256

4. In order that a defendant may protect himself by a previous judgment against the plaintiff, he must show that both suits involved, legally, the same subject-matter. *Davis v. Sexton*, 407

FRAUD—See INSOLVENCY, 3, 7, 15; LANDLORD AND TENANT, 2, 3; PARTNERSHIP, 9; SALES, 8, 9, 10, 12, 13; TRUST, 2, 4.

1. In an action brought to recover damages for the alleged fraud of the defendant, growing out of the bribery of enumerators chosen by himself and the plaintiff to determine the amount of timber and logs on certain land, to the end that they should underestimate the same, a contract of sale thereof from plaintiff to defendant having been previously entered into, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff. *Cartier v. Troy Lumber Co.*, 449

2. The mere neglect to record a real estate mortgage during the period that the mortgagor is incurring other debts, and the fact of giving judgment notes to certain creditors unknown to others, is not fraudulent, in so far as to justify allowing unsecured creditors to follow the proceeds of property upon which the liens of the other creditors were originally based. *W. O. Tyler Paper Co. v. Orcutt-Killick Lith. Co.*, 500

FRAUD. Continued.

3. Upon the contention by a creditor of a defunct corporation upon a debt contracted by it, while a certain mortgage upon its property to a person who had previously loaned it money was unrecorded, that it was entitled, having a judgment and unsatisfied execution, to follow the proceeds of the property into the hands of the mortgagee, he having taken possession under the mortgage, this court holds, that the acts of the mortgagee, being neither fraudulent in fact or by construction of law, the decree dismissing the complainant's bill was proper. *Id.*, 500

FRAUDULENT CONVEYANCES.

1. In attachment proceedings based upon the charge that the defendant had fraudulently conveyed his property, this court declines, in the absence of evidence of fraud in fact, to interfere with the judgment in his behalf. *Rhode v. Matthai*, 147

GAMING.

1. In an action brought to recover upon a promissory note, the defense being that the consideration thereof was made up of losses in gambling transactions upon the Board of Trade, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff. *Grubey v. Nat. Bank of Illinois*, 354

2. An adverse judgment can not be collaterally attacked in an action at law, on the ground that the action in which the judgment was rendered was based upon a gambling transaction. *Chicago Driving Park v. West*, 496

GARNISHMENT.

1. Insurance companies having agencies in this State are liable as garnishees of non-resident creditors under policies upon which payments are due through the occurrence of fires, although by the terms thereof they are payable in another State. *Henderson & Co. v. Schaas*, 155

2. The contingency that will render a debt not garnishable, must be one that affects the debt itself, and not the amount of it, or the time or manner of payment. *Miller v. Scorrille*, 385

3. Where all that remains to be done is to make such calculations as are necessary to ascertain the amount due, the indebtedness is sufficiently certain for the purpose of garnishment. *Id.*, 385

4. Upon an appeal from a judgment against a certain firm as garnishees, it being contended by it that a given percentage of the contract price was not, under a contract duly entered into, to be paid the attachment debtors until the engineer of the railroad in question should certify in writing, that their work was completed, this court holds that the debt which was owing from the garnishees under the contract referred to, was liable to garnishment, notwithstanding the fact that at the date of filing its answer, the certificate from the engineer had not been presented, and furthermore, that the production thereof was duly waived by certain acts of the garnishees. *Id.*, 385

5. The fact of the release by a defendant of all errors that inter-

GARNISHMENT. *Continued.*

vened touching a void judgment against him, can not operate to bind a garnishee whose liability, being statutory, is not dependent upon the favor of defendant. *Baldwin v. Ferguson*, 393

6. Credits due to several persons jointly can not be recovered in proceedings against a part of them only. *Id.*, 393

GUARANTY—See NEGOTIABLE INSTRUMENTS.

1. In an action to recover upon a written guaranty for payment of rent, this court holds, that in view of the terms thereof a subsequent assignment of the lease did not operate as a release of the guarantor. *Farnham v. Monroe*, 114

2. In an action brought to recover certain expenditures made for the repairs to steam heating apparatus, defendants, who put the same into the building in question, having entered into a guaranty to keep the same in working order for three years without expense to the plaintiff, this court holds that a certain instruction given can not be complained of, and declines to interfere with the verdict for him. *Davis v. Sexton*, 407

3. In case of a collateral continuing guaranty of the payment of debts of uncertain amounts, to mature at periods unknown, and the existence of which depends entirely on the future action of the principal and the guarantee, reasonable notice of default of payment by the principal need not be given to the guarantor, and he is not discharged to the extent of his loss or damage caused by the failure to give him such notice. *Taussig v. Reid*, 439

HOMESTEAD.

1. A homestead will not attach to a building alone, unaccompanied by an interest in the land. *Kuttner v. Haines*, 307

2. As against the landlord, a tenant has no homestead in premises after a given term expires. *Id.*, 307

HUSBAND AND WIFE—See DIVORCE; EVIDENCE, 6.**IDENTITY—See EVIDENCE, 8.****IMPEACHMENT—See EVIDENCE, 17.****INJUNCTIONS—See MORTGAGES, 7, 8.**

1. Upon a bill filed praying for an injunction to restrain the coroner from executing a writ of replevin, under which it was sought to obtain possession of certain goods, and for the appointment of a receiver to take charge of the property and assets of a firm named, this court holds that the party in whose behalf said writ was issued, was a necessary party defendant to the bill in question, it being apparent that the object thereof was to prevent the recovery of the goods referred to in said writ. *Walker v. Gibson*, 49

2. Upon a bill filed praying for an injunction to restrain the coroner from executing a writ of replevin and for the appointment of a receiver it is held: That while the plaintiff in the replevin suit was not a party to the proceedings involving the appointment of the receiver, and that the order making such appointment had no application to him, the coroner was such party, and the joinder of both in the appeal did

INJUNCTIONS. *Continued.*

not invalidate the same as to the latter, and that the order in question must be reversed, there being no allegations in the bill authorizing, as against the coroner, such appointment. *Id.*, 49

3. Upon a bill filed by a taxpayer to enjoin the delivery of a town warrant to defendant, for his compensation as town supervisor, it being alleged that his bill for services rendered was incorrect, this court declines, in view of the evidence, to interfere with the decree in behalf of the complainant. *Lundberg v. Boldenweck*, 79

4. The word "Snuswagasinet," meaning "Swedish Snuff Store" can not be appropriated as a trade name, being merely descriptive of the business. *Bolander v. Peterson*, 551

INSOLVENCY—See ATTACHMENTS, 1, 5; FRAUD, 2, 3; RECEIVERS.

1. Upon a contention as to whether a levy under a writ of attachment was made before the filing for record of a certain deed of assignment, this court declines, in view of the evidence, to interfere with the judgment of the trial court, denying the petition for priority. *Richardson v. Ascher*, 53

2. In such cases the law gives the same respect to the judgment of the court as to a verdict of a jury. *Id.*, 53

3. A verdict and judgment based upon a count in a declaration setting forth that the defendant purchased certain goods, "falsely pretending that he wished to buy on credit and pay for the goods, when in fact he intended not to pay for them," will not warrant the issuance of a *ca. sa.* against the body of the said defendant. *Kitson v. Ellinger*, 55

4. It is admissible in a case of this character for the defendant to show, that on the trial of the case in which the *ca. sa.* issued, the evidence was such that the verdict was necessarily upon a given count. *Id.*, 55

5. If the point upon which a case turned in the trial court appears, this court may review it, although the mode in which it appears is out of the usual course. *Id.*, 55

6. The act of 1837 only prohibits preferences set forth in deeds of assignment; the form thereof if adequate cuts no figure. *Farwell v. Nilsson*, 164

7. Before a court of equity has jurisdiction to prevent frauds upon such act, and to treat transfers as parts of an assignment, there must be the execution of an instrument which creates a trust for the benefit of creditors. *Id.*, 164

8. A debtor in failing circumstances not seeking the benefit of the assignment law, may prefer creditors by giving to one or more of them, judgment notes, by which they are enabled to satisfy their claims out of the debtor's property by the appropriation of all his assets, although to the exclusion of other creditors. *Id.*, 164

9. This court holds, in proceedings touching the assignment of an insolvent firm, a judgment by confession having been entered upon certain judgment notes previously given by it on the day a voluntary assignment was made by such firm, though at an earlier hour, that the

INSOLVENCY. Continued.

decree of the County Court setting forth, among other things, that such judgment and the execution thereon amounted to an unlawful preference, can not stand, and directs that said execution creditors be allowed priority of payment out of the goods levied upon. *Kaufman v. Schneider*, 256

10. It is the duty of the County Court in insolvent cases to pursue such course with reference to the property which comes to its hands as will best preserve its value and render it most available to creditors. In the efforts to realize the largest returns possible for the creditors, the court must be left in possession of a liberal discretion, and its orders will not be disturbed unless its discretion is manifestly abused. *Baker v. Singer*. 271

11. In cases of this sort, where the facts which induced the court to make the orders complained of, are not preserved in the record, the presumption arises that circumstances existed which warranted the same. *Id.*, 271

12. Upon a petition filed by attorneys who acted as solicitors for complainant in a bill in behalf of himself and other creditors and stockholders of an insolvent corporation for the appointment of a receiver and the winding up of the same, that their fees should be paid by such receiver out of the funds in his hands, this court holds, in view of the fact that it was greatly to the interest of complainant that the assets of the estate should be husbanded, the allowance of such fees would be unwarranted upon the ground that the taking of such action was a benefit to the estate. *Kadish v. Chicago Co-operative Brewing Ass'n*, 411

13. A creditor, holding the judgment note of his debtor, may avail himself of the benefit thereof, when he sees fit. He may delay until the danger of loss is impending, without sacrificing any advantage. *Plume & Atwood Mfg. Co. v. Caldwell*, 492

14. In a controversy involving the priority of certain levies upon property of a common debtor, this court declines to interfere with the decree of the trial court giving the bank in question priority over certain creditors, and placing the latter upon the level with other unpreferred creditors. *Id.*, 492

15. An attorney, who represented several creditors of an insolvent corporation, procured judgment notes for the claims held by him, and also for a creditor who held, as collateral, the notes of the corporation to his clients, entered judgments thereon, filed a creditor's bill, had the corporate assets sold by the receiver appointed therein, and bought in the property himself. The corporate stock was all controlled by one man, who gave the attorney information as to the affairs of the corporation, and whose wife was its principal creditor. It was not shown that the attorney had notice that the claims represented by him were fraudulent: *Held*, that he was not accountable to the other creditors of the corporation for the property bought by him, the evidence not sustaining a charge of conspiracy. *Robbins v. Butler Paper Co.*, 512

INSOLVENCY. *Continued.*

16. Upon the petition by an assignee, praying, among other things, that possession of certain property levied upon should be delivered to him by the sheriff, this court holds, that in view of the fact that the assignee was never in possession of any of the property in question, the County Court had no jurisdiction of the matters presented by the petition, and declines to interfere with the order dismissing the same. *Lorce v. Matson*, 602

INSTRUCTIONS—See ATTACHMENT, 10; EVIDENCE, 28; GUARANTY, 2; NUISANCES, 3; PERSONAL INJURIES, 7; PLEADING, 2, 8; PRACTICE, 12, 37, 43; RAILROADS, 8.

1. An instruction complained of will not be considered by this court unless all the instructions given are set out in the abstract. *Hellmuth v. Katschke*, 21

2. An instruction should not state that which it is the duty of the jury to find from the evidence. *Campau v. Bemis*, 37

3. A defendant relying upon the refusal of the trial court to instruct the jury at the close of the plaintiff's case to find in his behalf as erroneous, should not enter upon his defense. Having done so, the verdict must be tested by the entire evidence in the case. *Id.*, 37

4. In order to bind a party by an adverse verdict upon conflicting evidence, it is essential that the jury should not have been wrongfully instructed against him. *Counselman v. Collins*, 68

5. The fact that the trial court gave a counter instruction does not cure the giving of an erroneous one, it being impossible to tell which one the jury regarded, if either. *Id.*, 69

6. An instruction assuming a state of facts contrary to those shown by the evidence in the case, should not be given. *Lehman & Sons Co. v. Siggeman*, 161

7. An instruction setting forth that a preponderance of the evidence does not necessarily mean a majority of witnesses, and that the evidence of one creditable witness may be taken and given credence in preference to the evidence of a number of witnesses believed to be swearing falsely, should not be given, for a jury may not capriciously believe a number of witnesses are swearing to falsehoods. *Trott v. Wolfe*, 163

8. Bad instructions for the winning party are not cured by good ones for the loser. *Leiter v. Day*, 248

9. A party encouraging the giving of an erroneous instruction can not be heard to complain thereof. *McMahon v. Sankey*, 341

10. An instruction requiring the plaintiff to prove his case by a clear preponderance of the evidence is too strongly worded. *Cartier v. Troy Lumber Co.*, 449

11. Instructions informing the jury as to what they may or may not infer from the non-production of books and papers, should not be given. *Id.*, 449

12. An instruction setting forth that if a municipal corporation was found guilty, they should assess against it such damages as they believed from the evidence the plaintiff sustained as the direct result of

INSTRUCTIONS. *Continued.*

its negligence, can not be complained of. The word *direct* is synonymous with the words "natural and proximate," more commonly used. *Lovett v. City of Chicago*, 570

13. An instruction is erroneous which requires the jury to find two grounds before the plaintiff can recover, when the finding of either ground would entitle him to rescind a given contract. *Reed & Co. v. Pinney & Co.*, 610

INSURANCE—See GARNISHMENT, 1.

1. A death occasioned by the accidental drinking of poison, or an excessive quantity of a dangerous drug, is not within a condition in a policy setting forth that the same would become payable, if assured "shall have sustained bodily injuries received by, or through, external, violent and accidental means," "and such injuries alone shall have occasioned death." *Henly v. Mut. Acc. Ass'n of the N. W.*, 17

2. In an action against an insurance company to recover upon one of its policies, said company contending that the amount of goods claimed to have been consumed was exaggerated, it is held: That the trial court erred in admitting the testimony of firemen present at the fire, and of persons viewing the premises the day after the fire, the effect thereof being to show that the claim set up was excessive. *Pulver v. Rochester German Ins. Co.*, 24

3. In an action to recover, upon the parol promise of an insurance adjuster to pay a sum named within a given time, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff. *Miller's Nat. Ins. Co. v. Kinneard*, 105

4. In an action by a husband, upon the death of his wife, to recover from a mutual benefit association, in which she was insured, a sum which, under its constitution, was then payable, the association contending that she falsely stated her age when she became a member, being in fact, upon that account uninsurable, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff. *Deutscher Frauen Kranken Verein v. Berger*, 112

5. A contract of insurance impliedly assumes the risk of all carelessness by every person, whether a possible beneficiary under the contract or not, from which the death of the assured may result, unless such acts of carelessness are especially excepted; and a death which is unintentional, though caused by some neglect or unlawful act of the beneficiary, is within the contract and should not defeat the policy. *Schreiner v. High Court of I. C. O. F. L.*, 576

6. There can be no recovery in an action founded upon an intentional wrong. The beneficiary in an insurance policy can not recover where the death of assured has been intentionally caused by his act. *Id.*, 576

7. It is not necessary to show in a given case that the purpose of the beneficiary in murdering the assured was to obtain the amount at risk; it is enough if the killing was the intentional and wrongful act of the beneficiary named in the policy. *Id.*, 576

INSURANCE. *Continued.*

8. It is not necessary to find in the policy an exception in terms against the intentional killing of the assured by the beneficiary. Such exception is implied by law. *Id.*, 576

9. In an action brought to recover upon an endowment certificate of a mutual benefit association, this court holds, that the plea setting up the record of the Criminal Court, showing the indictment of the beneficiary therein for the murder of assured, her plea of guilt of manslaughter, and sentence to the penitentiary, constituted no defense to said action, and that judgment for the defendant can not stand. *Id.*, 576

10. In an action brought to recover upon a fire insurance policy, the plaintiff having moved for judgment upon a certain stipulation duly entered into, the defendant contending that it was not liable because of a certain alienation of the property insured, this court declines to interfere with the judgment for the plaintiff. *Niagara Fire Ins. Co. v. Scammon*, 582

11. The good standing of members of orders and societies must be left to the determination of the organizations themselves. Where such organization proceeds to determine the question in accordance with the rules and regulations thereof it will bind the member, and in the absence of fraud, or such irregularity as goes to the jurisdiction of the society in the particular case, the determination will be treated as final and conclusive in courts of justice and in the absence of peculiar and exceptional provisions in an endowment certificate, issued by such organization, or its by-laws, a court will not look into the moral conduct of one who was in membership at the time of his death, for the purpose of determining whether he was in good standing. *High Court of I. O. of F. v. Zak*, 613

12. The issue of such certificate to the beneficiary is a contract, and creates property rights which are not to be divested, save in accordance with the terms of the contract and the rules of the society, which form a part thereof, and except in cases where the contract provides for a forfeiture of all rights under it, *ipso facto*, on the happening of some event, the good standing of the member in the society will continue until his *status* therein has been shown to be changed by some proceeding of the society taken in pursuance of its rules and by-laws. *Id.*, 613

13. The good standing of a member can not be affected by showing his general bad reputation, nor by proving specific lapses from virtue or honesty. *Id.*, 613

INTERPLEADER—See AGENCY, 1; MORTGAGES.

JUDGMENTS AND DECREES—See CERTIORARI, 2; FRAUD, 2.

1. Where the defendant is duly served with process, or appeared in the cause, the judgment of a court of a given State is conclusive for all purposes and is not open to inquiry upon the merits. If the judgment is conclusive in the State where it was pronounced, it is equally conclusive in all the courts of any other State, and the Legislature of another State is powerless to authorize its courts to open the merits

JUDGMENTS AND DECREES. *Continued.*

and review the cause, or to enact that such a judgment shall not receive the same faith and credit that it had by law in the State where it was rendered. *U. S. Express Co. v. Smith*, 90

2. The reversal of one or more of several dependent judgments, operates as a reversal of all of them. *Alling v. Wenzell*, 246

3. Equity will not interfere in behalf of the maker of a judgment note, founded upon a sufficient consideration, where judgment is taken thereon, without jurisdiction of such maker. *Kaufman v. Schneider*, 256

4. Upon a motion to set aside a judgment, and for a new trial, said judgment having been rendered in the absence of petitioner, a party to the suit, it clearly appearing that such absence was due to a misunderstanding on his part, this court declines to interfere with the judgment against him. *Byrne v. O'Neill*, 361

5. A judgment against a defendant by default is not conclusive as to his right to recover on a claim pleaded by him as a set-off. *Litch v. Clinch*, 654

6. Under a stipulation to the effect that several cases shall be tried by the court without a jury, and that all cases after the first one tried shall abide the event of that case, both in the Circuit Court and on appeal, judgment should be rendered in all the cases according to the final decision in said first case. *Commercial U. Assurance Co. v. Scammon*, 659

7. After being refused judgment on one ground, taking it on another ground is no waiver of the party's right to judgment on the ground on which it was refused. *Id.*, 659

JURISDICTION—See ACTION, 4; EVIDENCE, 12; PRACTICE, 50; TRUST, 3.

1. The Probate Court has jurisdiction of the person of one who is present in answer to a citation. *Blair v. Sennott*, 363

2. However numerous may be the defendants in an action, the steps by which jurisdiction over them respectively is obtained, are several as to each. *Baldwin v. Ferguson*, 893

3. Consent by creditors suing separate attachments out of the Circuit Court, that property attached be turned over to the assignee of the common creditor subsequently appointed by the County Court, gives the latter court exclusive jurisdiction in the adjustment of claims against the property. *Plume & Atwood Mfg. Co. v. Caldwell*, 492

4. This court has no jurisdiction to review any matters involved in a given controversy, where the constitutionality of a statute is involved. *Graham v. People*, 568

5. A justice of the peace has jurisdiction of actions involving injuries to personal property. *Gallery v. Davis*, 619

6. The statute which excludes from the cognizance of the Appellate Court "cases involving the validity of a statute," does not take away its jurisdiction to decide whether a statute has been repealed. *Village of Morgan Park v. Gahan*, 646

JUSTICES—See APPEAL AND ERROR, 1, 8, 9; JURISDICTION, 5.

LANDLORD AND TENANT—See GUARANTY, 1; HOMESTEAD, 2.

1. The filing of a cognovit in an action for the recovery of rent, acknowledging the cause of action, the amount of damages, and releasing all errors in conformity with a condition in a lease naming a certain person as attorney for the lessees with such powers, operates to bind the parties executing the same, and no mere error up to and including the entry of judgment can be urged as a reason for the reversal thereof, unless a want of jurisdiction or exercise of power not given, is shown. *Little v. Dyer*, 85

2. It is the duty of a lessee, upon the discovery that representations which induced the hiring of the premises were fraudulent, to rescind the lease, if it is desired to escape its obligations. Failing to do so amounts to an election to continue the same in force, and to abide by its covenants. *Id.*, 85

3. Fraudulent representations made to induce the acceptance of a lease under seal, can not be relied upon as a defense in an action thereon; the remedy of the injured party in such cases is in equity. *Id.*, 85

4. Upon the cancellation of a lease the delivery by the lessee of his copy to the lessor can have no effect upon the warrant of attorney provided for, in the absence of a binding agreement canceling the same. *Id.*, 85

5. In an action brought to recover damages for the alleged breach by a landlord of an implied covenant for peaceable and quiet enjoyment, it being claimed that the heat in the premises in question became so oppressive as to compel removal upon the part of the plaintiff, this court holds that defendant was entitled to operate the premises in the same manner under the lease in force when the plaintiffs moved, as under a former one between the same parties; that no evidence was introduced justifying the damages awarded, and that the verdict for the plaintiff can not stand. *Chi. Warehouse, etc., Co. v. Ill. Pneumatic Tool Co.*, 144

6. The presumption is, that furniture in use in a dwelling belongs to the occupant, and a levy thereon for rent by the landlord will not render him liable for exemplary damages unless it appears that he knew that the same belonged to another. Nor would knowledge on the landlord's part that there was a chattel mortgage upon the same, deprive him of the right of levying his distress or subject him to liability for punitive damages for so doing. *Mackin v. Blythe*, 216

7. Neither will a landlord be liable for more than the actual damage, where such goods are seized by his agents with knowledge that the same have been taken possession of under a mortgage, by a third person, unless, with full knowledge of all the facts, he ratifies such action. *Id.*, 216

8. Nor will the retention of the goods by the landlord, after being informed of the claim of such third person, subject him to punitive damages, if in good faith he proposes retaining the same, to test the validity of the mortgage running to such person, and the title to the goods thereunder. *Id.*, 216

9. In an action brought for the recovery of damages for a trespass

LANDLORD AND TENANT. *Continued.*

growing out of a levy upon certain household furniture for rent due from another, the plaintiff claiming to be in possession thereof under purchase at mortgage sale, this court holds that the evidence does not justify the conclusion that the landlord intentionally and knowingly kept trunks containing her apparel, levied upon at the time the household goods were taken, to wantonly oppress and harass her or to gratify his malice; that the instruction given in her behalf touching the estimation of damages was erroneous; likewise the refusal to allow defendants' counsel to ask the plaintiff upon cross-examination as to her motive in taking the mortgage in question; likewise the ruling that if there was a legal consideration for the mortgage, the intention or motive in taking it cut no figure, and that judgment for the plaintiff can not stand. *Id.*, 216

10. In proceedings touching a landlord's lien for ground rent and taxes upon certain buildings conceded to be chattel property, this court holds that the terms of sale thereof were within the discretion of the court, and declines to interfere with the decree. *Kuttner v. Haines*, 307

11. A provision in a lease to two lessees that, "the party of the second part" authorizes any attorney to enter "their" appearance and confess judgment, gives authority to confess judgment against both lessees. *Frank v. Thomas*, 547

12. Where confession of judgment on a lease is entered in term time, the copy of the lease attached to the declaration becomes no part of the record. *Id.*, 547

13. In an action brought for the recovery of rent, this court holds that the evidence justified the finding of the trial court that the lease involved was duly delivered, and that the error therein touching the year in which it was to end, can not affect the right of recovery thereon. *Nyquist v. Martin*, 623

LARCENY—See TRESPASS, 3.

LIBEL.

1. The imputation that one holds certain opinions is not libelous. *Cerrenu v. Chicago Daily News Company*, 560

2. A foreign corporation may maintain in this State an action for libel. *Jewellers' Mercantile Agency v. Douglass*, 627

LIMITATIONS—See ADMINISTRATION, 2.

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, this court holds that on account of an objectionable remark to the jury on the part of the trial judge, the verdict for the plaintiff can not stand. *Lively v. Sexton*, 417

MANDAMUS.

1. The filing of a petition for mandamus herein and the issuance of summons, to the end that a judge of the Superior Court should sign a bill of exceptions, is improper without first obtaining leave to file. *Hawkins v. Harding*, 25

MASTER AND SERVANT—See PERSONAL INJURIES.

1. This court declines to interfere with the verdict for the plaintiff in an action brought to recover for personal injuries alleged to have been suffered by him, through the negligence of one of defendant's servants. *Chicago Hansom Cab Co. v. McCarthy*, 199

2. In an action brought to recover a balance alleged to be due under a contract of service, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff. *Cary v. Norton*, 365

3. In an action brought to recover a balance claimed to be due on account of wages, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff. *Kraemer v. Leister*, 391

4. In order to justify the retention of the deposit of an employe upon his discharge, the contract of service providing for such retention in certain cases, it must be shown that a contingency arose which warranted such action. *Chicago City Ry. Co. v. Blanchard*, 481

5. Where the right to recover a deposit depends upon the exercise of the judgment of a given person, the forfeiture thereof under such clause will not be permitted unless it be shown that there was an exercise of such judgment in good faith, and in a reasonable, and not in an arbitrary or capricious manner. *Id.*, 481

6. In an action brought by a discharged employe of a street railroad company to recover the amount of a deposit made by him upon entering the employment of such company and certain wages alleged to be due, this court holds, that the terms of the written contract under which the plaintiff was first employed was in no way changed or modified by a subsequent parol agreement to accept less wages, if allowed to continue in such employment; that the contract first entered into controlled plaintiff's right of recovery upon his final discharge, and that in the absence of evidence warranting the retention of the sums in question, the judgment for the plaintiff must be affirmed. *Id.*, 481

7. In an action brought to recover for extra work, in connection with the erection of a building, this court declines, the evidence being sharply conflicting, to interfere with the verdict for the plaintiff. *Thurber v. Anderson*, 628

8. A master must use diligence in providing and maintaining safe machinery and appliances to be handled by his employes, and he is bound to inspect the cars of other persons or companies which his servants are required to operate in the course of their employment. *Sack v. Dolese*, 636

9. Before it can be said that the master's negligence in failing to inspect, was the cause of an injury, it must be shown that the fault or defect in the appliance in question was one which a proper inspection would have disclosed, even though, from the nature of the accident, it may be readily concluded that some defect did, in fact, exist. *Id.*, 636

10. In such cases the burden of proof is upon the plaintiff. *Id.*, 636

11. In an action brought by a servant to recover from his employers for personal injuries alleged to have been occasioned through their negligence, this court declines, in view of the evidence, to interfere with the verdict for the defendants. *Id.*, 636

MECHANIC'S LIENS.

1. An account is verified the same as a petition or plea by making oath to the truth of the facts set forth therein. *McDonald v. Rosen garten.* 71
2. The filing of a statement verified by an affidavit is essential to the creation of a mechanic's lien. *Id.*, 71
3. Such statement is required to set forth the amount due after allowing all credits, and the times when the material was furnished, or the labor performed, and a correct description of the property to be charged with the lien. *Id.*, 71
4. Such requirements are not met by stating the amount due in a lump sum, after deducting all credits, without stating any items composing the account, or showing what the credits were, and stating that the work or contract was completed at a certain time, without showing the time or times when it was commenced or performed, or the period during which the materials were furnished or the labor claimed for, rendered. *Id.*, 71
5. Provisions of law which are conditions precedent to the attachment of a lien must be strictly complied with. *Id.*, 71
6. The recognition by an owner and building contractor, of the surviving member of a firm of architects upon whose certificates payments were to be made, as superintendent and architect, is binding upon both. *Davidson v. Provost,* 128
7. Upon a bill filed by a building contractor to enforce a mechanic's lien for an amount claimed to be due, this court holds as erroneous the refusal of the trial court to admit, upon the part of the defendant, evidence going to show that the plaintiff had not followed the plans and specifications, whereby he was injured, and that the decree for the plaintiff can not stand. *Id.*, 128
8. A mechanic's lien can not be enforced upon premises where a given contract was to have been performed, where no part of the labor has been done and no part of the materials used when the same is rescinded by the owner. *Horr v. Slavik,* 141
9. Work done and materials furnished without such owner's consent after notice of rescission do not affect the general rule. *Id.*, 141
10. In such case the contractor's remedy is confined to an action for damages for breach of the contract. *Id.*, 141
11. A contractor who hires out his license to another who has none, in order that the latter may purchase material and carry out a contract he has entered into, is not entitled to a lien upon the premises in question, in case of non-payment of the price agreed upon for the use of said license. *Burnside v. O'Hara,* 150
12. A waiver by an owner of that which the statute expressly makes a condition precedent to the attaching of a lien, can not be relied upon as a substitute for the performance of the condition in question. *Id.*, 150
13. Upon an appeal from a decree awarding a mechanic's lien, the record should definitely show that the same was against the right property. *Maxwell v. Koeritz,* 300

MECHANIC'S LIENS. *Continued.*

14. In the case presented, this court holds that the word "creditor" in Sec. 4, Chap. 82, R. S., as amended, does not mean subcontractor.

Id., 300

15. In a suit for mechanic's lien where the mechanic was wrongfully discharged, the value of the work done must be measured, under section 11 of the Lien Act, in proportion to the contract price of the whole work. *Watrous v. Davies*, 542

MISTAKE—See **DEPOSIT**, 1.

MORTGAGES—See **FRAUD**, 2; **LANDLORD AND TENANT**, 6, 7, 8, 9; **TRUSTEES**, 7.

1. Mortgages upon stock and fixtures are invalid, so far as the stock is concerned, as against creditors of the mortgagor when sales therefrom are made by consent of the mortgagees. *Rhode v. Matthai*, 147

2. Where a debt is secured by a mortgage, the assignment of part of the debt carries the benefit and control of the security, upon such terms as the relations between the assignee and the holder of the residue of the debt may require. *Magloughlin v. Clark*, 252

3. The purchase by the trustee in, or by the holder of the indebtedness of, a prior incumbrance, or any part of the indebtedness of a junior incumbrance, must, as between the two, be held to be so much in the nature of a partial redemption, as to leave to the holder of the residue priority of right to the satisfaction of that residue, before applying any proceeds of the property to the satisfaction of that part of the debt so sold. *Id.*, 252

4. The owner of land subject to mortgage who has been made defendant in a suit by the mortgagee to foreclose the mortgage, and in another suit by a former owner of the land to establish his title to the mortgage, may by bill in the nature of an interpleader, compel such adverse claimants to interplead. *Curtis v. Williams*, 518

5. Such bill of interpleader should be an original bill and not a cross-bill in one of the former suits. *Id.*, 518

6. It is no objection to such bill that the complainant therein has filed an answer in one of the former suits. *Id.*, 518

7. On the filing of such bill a preliminary injunction restraining the prosecution of the former suits may be issued, though no positive injury is shown. *Id.*, 518

8. On the application for such injunction, the complainant's sworn allegation that the bill is brought without collusion can not be contradicted. *Id.*, 518

9. Where a defendant in partition files a cross-bill asking to have a deed given by him declared a satisfied mortgage, and that it be canceled, and that an accounting be had between him and the mortgagee, the court may, if it finds the deed to be an unsatisfied mortgage, determine the amount due thereon, though no other affirmative relief is prayed for by the mortgagee. *Linch v. Clinch*, 654

MUNICIPAL CORPORATIONS—See **PERSONAL INJURIES**, 5; **RAILROADS**, 1.

1. The history of city council proceedings pending the considera-

MUNICIPAL CORPORATIONS. *Continued.*

tion of an ordinance which is but a proposition, and is of no effect unless accepted by the party to whom it is made, can not be used to give force or meaning to the contract so made. *C., B. & Q. R. R. Co. v. City of Chicago*, 206

2. An advertisement by a village for bids for work on a local improvement, to be paid for by special assessment, while it charges the bidders with notice of the ordinance, providing for the improvement in question, does not affect them with notice of a subsequent ordinance providing the method in which the special assessment shall be levied. *Village of Morgan Park v. Gahan*, 646

3. Where an ordinance providing for a local improvement, declares that it shall be paid for by special assessment, the passage of a subsequent invalid ordinance providing that the assessment shall be paid in ten annual installments, is such an attempt to change the proposed contract as will justify a bidder in refusing to execute it. *Id.*, 646

NEGLECT—See EVIDENCE, 1; MUNICIPAL CORPORATION; PERSONAL INJURIES; RAILROADS.

1. Negligence is a question of fact for the jury. *Trott v. Wolfe*, 163

2. Negligence and due care, and degrees and comparisons of negligence, are questions of fact for the jury, and their determination should not be interfered with, unless it appears that they have disregarded their duty. *C. M. & St. P. Ry. Co. v. Wilson*, 346

3. Negligence is a question of fact for the jury, and when the evidence is conflicting their verdict is conclusive. *Chicago City Ry. Co. v. Brady*, 460

NEGOTIABLE INSTRUMENTS—See CONTRACTS, 5, 6; GAMING, 1; INSOLVENCY, 11, 13, 15; JUDGMENTS AND DECREES, 3; TRUST, 5, 6.

1. The writing of his name by the payee of a note on the back thereof implies a contract that parol evidence is inadmissible to vary. *Kingsland v. Koeppe*, 81

2. On a blank indorsement by a stranger to the note the law implies no contract, but presumes, in the absence of evidence to the contrary, the assumption of a contract of guaranty. *Id.*, 81

3. The presumption is, unless the facts are shown to have been otherwise, that the indorsement was placed upon the note when the same was made, and therefore was intended as a guaranty supported by the original consideration of the note. *Id.*, 81

4. Evidence as to conversations between the parties at the time of the indorsement, is admissible in such case, and it is a question of fact whether such signer did, in fact, intend that personal liability as guarantor should be incurred or not. *Id.*, 81

5. In an action by the indorsee of a note against the indorser thereof, the contention of the defendant being that an agreement to renew was not carried out, for the reason that a third person, instead of signing the same as surety, executed his individual note for that purpose, this court holds that in view of the evidence the verdict for the defendant can not stand. *Kaufman v. Lindell*, 119

NEGOTIABLE INSTRUMENTS. *Continued.*

6. In an action brought to recover upon certain promissory notes given to renew a prior indebtedness of a copartnership subsequent to the dissolution thereof by one of its members who signed the firm name thereto, he having purchased the interests of the other partners, and agreed to assume the debts of such firm, this court holds, the contention being as to whether, when said notes were delivered, the officers of the bank receiving them knew of such dissolution, and that the firm debts had been so assumed, that, in view of the giving of erroneous and misleading instructions, the judgment for the defendant can not stand.

Dixon Nat. Bank v. Spielmann, 184

7. Although a draft upon consignees in favor of one making advances is dishonored, the delivery of the shipping receipt to such person is equivalent to a delivery of the property in question. *Rumsey v. Nickerson,* 188

8. The delivery of commercial paper with unfilled blanks, carries with it authority to fill the same, and the rule applies to powers of attorney attached thereto. *White v. Alward,* 195

9. In the absence of an agreement to the contrary, a holder can only fill such blanks as the context shows they should be filled, and where it does not show, they must be filled with regard to what is reasonable under the circumstances. *Id.,* 195

10. If in such case the amount inserted as attorney's fees in a power of attorney is excessive, it may be reduced to what is reasonable. *Id.,* 195

11. The title to a check mailed to the payee without his request, remains in the sender during transmission. *Buehler v. Gill,* 225

12. The making of a check and having the same certified by a bank passes no title to the funds on which the check is drawn to the person named as the payee thereof, until delivery. *Id.,* 225

13. Delivery of an instrument is not presumed from the fact of its execution. While the maker retains the custody of the instrument, the inference is that it has not been delivered; and unless there is evidence to put a party on notice that it has been delivered, he may legally deal with the instrument, on the assumption that it has never passed from the custody of the maker. *Id.,* 225

14. In an action brought to recover upon a promissory note, the contention being as to whether the same had been executed by the defendant, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff. *Dorsett v. Clother,* 281

15. While the giving of a note of itself unexplained is not evidence of a settlement of all accounts between the parties, it tends to corroborate testimony of such settlement. *Heffron v. Chapin & Gore,* 565

16. In connection with other circumstances, without any direct testimony of a settlement, the giving of a note may be evidence of the existence of a demand, subject to no counter-claim. *Id.,* 565

17. The giving of a check is not a representation that the maker has the money in the bank upon which it is drawn, but it is a represen-

NEGOTIABLE INSTRUMENTS. *Continued.*

tation that the check is a good and valid order for its amount; that the existing state of facts is such that in ordinary course the check will be met. *Barton v. The People*, 573

18. The neglect of the payee of a check to present the same the day succeeding that upon which it was given, imposes upon him only the risk of whatever damage may result to the maker therefrom. *Maddeon v. Heath & Milligan Mfg. Co.*, 588

19. In an action by a bank to recover from the drawers of a check paid by it in conformity with an arrangement with the private banker upon whom it was drawn, to receive at the clearing house and to advance money upon checks drawn upon him, the same to be subject to his approval, settlements to be made each day, said banker subsequently becoming insolvent, this court holds that the failure of said bank to return the check in suit to the bank that sent it, by a certain hour in the day, subjected it to the risk that such bank had, after the expiration thereof, changed its position so that a subsequent return would work them an injury that would not have occurred had it been returned within the time limited for that purpose, and declines to interfere with the judgment for the plaintiff. *Id.*, 588

20. There is no presumption of guaranty from the indorsement of a note by a stranger, where the contract is written out on the back of the note in terms pointing to a different liability. *Delamater v. Kearns*, 634

21. In an action against the indorser of a promissory note, this court holds, there being no evidence of diligence to collect from the maker, or that a suit against her would have been unavailing, or that she had absconded, or resided out of or had left the State, that the judgment for the plaintiff can not stand. *Id.*, 634

NEW TRIAL.

1. The refusal of a new trial to the plaintiff in a suit brought against a municipality to recover for injuries alleged to have occurred through its negligence, upon the ground that the verdict in his favor was inadequate, will not be disturbed merely on the strength of such inconsistency. *Locett v. City of Chicago*, 570

NUISANCES.

1. It is a rule of law in this State, that for a nuisance, permanent in its character, affecting the value of adjacent property, if continued, the owner of such property may accept and ratify the feature of permanency, sue once for all, and recover his whole damages, instead of being driven to successive suits. *Chi. Forge & Bolt Co. v. Sanche*, 174

2. Such property owner may bring an action for temporary disturbance or permanent loss, but not upon both grounds, and if suit is brought for the latter reason, the lesser claim becomes merged therein. *Id.*, 174

3. In the case presented it is held: That it was improper for the trial court to exclude instructions offered on behalf of the defendants,

NUISANCES. *Continued.*

the same setting forth that if the operation of the establishment in question had increased the value of the property claimed to have been injured, in excess of damage done, no recovery could be had. *Id.*, 174

PARTIES—See **AMENDMENT**, 1; **CRIMINAL LAW**, 1; **INJUNCTIONS**, 2.

PARTITION—See **MORTGAGES**, 9.

PARTNERSHIP—See **NEGOTIABLE INSTRUMENTS**, 6; **PRACTICE**, 13.

1. The knowledge of one of several co-partners as to a matter of firm business must be looked upon as the knowledge of the firm. *McDonald v. Western Refrigerating Co.*, 283

2. An assignment by less than the full number of the members of a given firm, of patents owned by it, conveys only their interests therein after the payment of the partnership debts. *Covel v. Benjamin*, 297

3. The statute authorizing limited partnerships must be substantially complied with, or those who associate under it will be liable as general partners, and notice to creditors that the debtors only expected or intended to be liable as special partners, will not restrict their liability. *Manhattan Brass Co. v. Allin*, 336

4. The contribution of "a specific amount of capital in cash, or other property at cash value," is not fulfilled by postponing the payment of the indebtedness to the special partners due from a preceding insolvent firm, until the new one shall have paid the other creditors of the old one. *Id.*, 336

5. In the case presented, this court holds that the defendants were liable as general partners, and that the judgment against the plaintiff can not stand. *Id.*, 336

6. If one partner and a third person take into their possession firm property, such act will not constitute a trespass. *Sindelar v. Walker*. 607

7. One partner can not recover for a trespass to the firm property directed or assented to by a co-partner. *Id.*, 607

8. One partner has nothing separately in the *corpus* of the partnership effects. His interest is what remains after the partnership debts are paid, and an account taken. *Id.*, 607

9. This court holds as proper, the sustaining of a demurrer to the declaration in the case presented, the same alleging that a co-partner of the plaintiff in collusion with the defendant, wrongfully and fraudulently foreclosed a chattel mortgage upon firm property. *Id.*, 607

PAYMENT.

1. It is a debtor's duty to seek his creditor if he is within the State. *Madderom v. Heath & Milligan Mfg. Co.*, 588

PERSONAL INJURIES—See **DAMAGES**; **EVIDENCE**, 6, 24, 29; **MASTER AND SERVANT**; **NEW TRIAL**, 1; **RAILROADS**.

1. In an action brought by a servant against his employer to recover for personal injuries alleged to have been suffered through the negligence of a superior servant, this court declines to interfere with the judgment in behalf of the plaintiff. *Hellmuth v. Katschke*, 21

PERSONAL INJURIES. *Continued.*

2. In an action brought to recover from an employer for an injury alleged to have been suffered by an employe through its negligence, this court holds, in the absence of evidence going to show that the person injured was commanded to take the position in which he was when hurt, that the verdict in his behalf can not stand. *Goss & Phillips Mfg. Co. v. Suelau*, 103

3. In an action brought to recover from an employer for injuries suffered by a servant through undertaking a work outside the scope of his employment, by the order of a superior servant, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff. *Lehman & Sons Co. v. Siggeman*, 161

4. In an action brought to recover from a railroad company for the death of an employe alleged to have been occasioned by the failure of a superior servant to watch, as agreed, for approaching trains, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff. *C., St. L. & P. R. R. Co. v. Gross*, 178

5. In an action brought to recover damages from a municipality for personal injuries alleged to have been occasioned by a defective sidewalk, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff. *City of Chicago v. McLean*, 273

6. In the case presented, an unprotected elevator shaft being the cause of the injury, the plaintiff having been rightfully upon the premises in question, the court declines to interfere with the judgment for the plaintiff. *Marder, Luse & Co. v. Leary*, 420

7. In an action brought for the recovery of damages for personal injuries, alleged to have been occasioned through the negligence of another, it is proper to instruct the jury to consider in the estimation of damages, plaintiff's loss of time, there being neither allegations nor direct proof thereof, where the injury suffered necessarily imports such loss. *Chicago City Ry. Co. v. Hastings*, 434

8. In an action brought by an employe to recover for a personal injury alleged to have been occasioned by his employer's negligence in failing to provide proper machinery and appliances, this court holds, it not appearing upon what ground the same was based, that the verdict for the plaintiff can not stand. *U. S. Rolling Stock Co. v. Chadwick*, 474

9. Persons in imminent peril are not required to exercise all the presence of mind and care of one who is prudent and careful. *North Chicago St. Ry. Co. v. Louis*, 477

10. In such cases it is a question for the jury, whether or not the party acted rashly and under undue apprehension of danger. *Id.*, 477

11. In an action brought to recover for personal injuries alleged to have been occasioned through the negligence of the defendant, this court holds, in view of the introduction of improper testimony on behalf of the plaintiff, that the verdict in her favor can not stand. *Nat. Gas Light & Fuel Co. v. Miethke*, 629

PLEADING—See ACCOUNT, 1; CREDITOR'S BILL, 2; MORTGAGES, 4, 5, 6; PARTNERSHIP, 9; PRACTICE, 22, 45, 48, 49; TRUSTS, 6; WAREHOUSES, 2.

1. A defendant proving one of several pleas in bar is entitled to a judgment. *Leiter v. Day*, 248

2. If the plaintiff in a given cause recover a verdict upon a declaration containing any good count, with evidence applicable to it, and correct instructions as to the hypothesis upon which he may recover, the verdict can not be disturbed because of a faulty count; but if the evidence be only such as sustains the faulty count, or if the instructions, either by reference to, or recapitulation of the averments of such count, put the right to recover upon the basis, among others, of such faulty count being proved, then, unless the justice of the verdict upon the whole case be clear, the same should not be allowed to stand. *U. S. Rolling Stock Co. v. Chadwick*, 474

3. Where several counts in a declaration, all good, are referred to by the instruction for the plaintiff, and there is a lack of evidence as to one or more, it devolves upon the defendant to call the attention of the jury to the different allegations of the several counts if he chooses so to do. *Id.*, 474

4. A stipulation setting forth that one case shall "abide by the issue" of another, means that it shall abide "the ultimate result or end," of such other. *Niagara Fire Ins. Co. v. Scrimmon*, 592

5. A special count is never necessary in actions for money had and received. *Village of Morgan Park v. Gahan*, 646

PRACTICE—See APPEAL AND ERROR; BASTARDY, 2; BILL OF EXCEPTIONS; CERTIORARI; EVIDENCE; GAMING, 2; INSTRUCTIONS, 3; JUDGMENTS AND DECREES, 4, 7; MALICIOUS PROSECUTION, 1; PLEADING.

1. It is proper to refuse to enter a rule to show cause why a judgment should not be satisfied of record, where the affidavits filed show only grounds existing before the entry thereof. *Hawkins v. Harding*, 25

2. Where a continuance is sought on account of the absence of a party in interest who is expected to testify as a witness, a higher degree of diligence is required to procure his attendance or deposition than where the absent witness is a stranger to the suit. *Mantonya v. Huerter*, 27

3. Affidavits in support of a motion for a continuance based upon the absence of a party to the suit through ill health, should set up his expectation as to returning, or the probability of obtaining his testimony at some future time. *Id.*, 27

4. In the case presented, this court holds that the affidavits filed contained nothing inconsistent with the view that defendant's deposition might have been taken before he went abroad; that they are vague and uncertain as to his health, and the length of time he had been ill when he left the city; that nothing definite is stated as to the time of his return; and declines to interfere with the ruling of the trial court denying the motion in question. *Id.*, 27

5. This court will not reverse because the verdict may be against the evidence, unless it is apparent that upon another trial before a jury, the result would be different. *Cudahy v. Powell*, 29

PRACTICE. *Continued.*

6. In the absence from the record of evidence to the contrary this court will presume the judgment of the trial court to have been correct. *Matson v. Davies*, 78
7. In a case tried without a jury, the finding of the court must stand unless it appears to have been based upon an erroneous view of the law. *Kingsland v. Koeppe*, 81
8. Harmless errors can not be complained of. *Id.*, 81
9. This court declines to consider the case presented, in the absence from the record of a bill of exceptions. *Obermann Brewing Co. v. Adams*, 136
10. The original bill may be incorporated in the transcript of the record by agreement of the parties, but not otherwise. *Id.*, 136
11. Where a County Court within a district over which an Appellate Court has jurisdiction, is presided over by one who is not the judge of that County Court, and there is nothing in the record to show why he does so preside, the Appellate Court, if the proceedings come before it for review, must take notice of the fact, if fact it be, that the person so presiding is judge of another County Court of this State, whether in the same district or another, and presume the existence of circumstances justifying him in so presiding. *Stricker v. Kubusky*, 159
12. If in a given case there is a conflict of evidence on a material issue of fact, and the instructions given are found to be misleading and inaccurate, and a reviewing court can see that such erroneous instructions may have influenced the jury to the injury of the party assigning error upon them, the verdict must be set aside and the case remanded for a new trial. *Dixon Nat. Bank v. Spielmann*, 184
13. A receiver in proceedings touching the dissolution of a partnership should not employ the attorney of the complainant in the bill filed with that end in view. *Heffron v. Flower, Remy & Holstein*, 200
14. A general objection is not enough to raise the point that a question is leading. *Edmanson v. Andrews & Co.*, 223
15. An order that an action of assumpsit be changed to that of account, has no effect while the pleadings remain in assumpsit. Complaint of such action primarily made herein comes too late. *Pardridge v. Ryan*, 230
16. A court has no power to direct the parties to a given suit how they shall proceed. *Id.*, 230
17. There is no law requiring a referee to be sworn. *Id.*, 230
18. The knowledge of an attorney that an auditor is a master in chancery, and the taking of testimony before him as such, he likewise knowing that the order of appointment as auditor had not reached him, amounts to a waiver of the fact that he was never sworn as such. *Id.*, 230
19. The appointment of a referee to try a common law controversy stands upon the same reason as the reference to a master of a similar controversy in chancery, and the proceedings, founded upon the same necessity, should be similar. *Id.*, 230

PRACTICE. *Continued.*

20. Upon an agreement of counsel in proceedings before a referee touching the taking of accounts, that objections to questions asked should be taken down, but should not be passed upon by him, and that they should be reserved in the testimony when it came before the court if either party wanted to raise the questions, an exception will not lie to the referee's report unless it affirmatively shows that a wrong result has been reached. *Id.*, 230

21. Whatever surplusage such report contains, not so connected in terms with the other matter that it may not be stricken out without changing the meaning of what is left, may be rejected. And so treating such report, the finding upon the main issue between the parties stands, like the verdict of a jury upon conflicting evidence, as a finality. *Id.*, 230

22. This court will not go outside the record in a given case, and refer to its record or memory of former litigation to the prejudice of parties to such case. *Magloughlin v. Clark*, 252

23. An original bill will not lie to review an interlocutory decree. *Bates v. Great Western Tel. Co.*, 254

24. Improper statements of counsel made during the trial of a cause will not justify a reversal unless it appears that they probably had a material influence on the result. *Dorsett v. Clother*, 281

25. Counsel should not be permitted in civil cases to read law to the jury. *Nash v. Burns*, 296

26. If a bill of exceptions does not state that it contains all the evidence in a given case, this court will presume that the decision of the trial court was justified by evidence not shown, if that shown is sufficient to support the same. *Garrity v. Hamburger Co.*, 309

27. In the absence of evidence to the contrary, an auditor will be presumed to have been duly sworn. *Id.*, 309

28. A variance between the declaration and the proof can not be primarily raised in this court. *McMahon v. Sankey*, 341

29. A trial court may properly refuse to submit special interrogatories to the jury, on the part of the defendant, when they were not shown to the counsel for the plaintiff until after the beginning of the argument to the jury. *Id.*, 341

30. An order overruling a motion for a new trial is not final, and no appeal lies therefrom. *Reedy Elevator Mfg. Co. v. Pitowsky*. 364

31. Matters *in pais* may be introduced into a bill of exceptions by way of amendment, after the term and after the lapse of the time allowed for presenting and filing the bill, if the court was in possession of sufficient memoranda or notes to give definite information as to what the actual proceedings were; and unless the contrary affirmatively appears, it will be presumed that the judge who made the amendment was thus informed. *Pollard v. Rutter*, 370

32. A court can have no better source of information than its own record. *Id.*, 370

PRACTICE. *Continued.*

33. A plaintiff can always avert the consequences of a surprise by moving for a continuance or dismissing his case, and to proceed with the case without doing so, waives the surprise. *Dueber Watch Case Mfg. Co. v. Lapp*, 372
34. In the examination of alleged errors in findings by trial courts, courts of review will be bound thereby unless it can be seen that the same are manifestly against the weight of the evidence. *Conwell v. Inderrieden*, 389
35. Where no question of law intervenes, the finding of a judge in a trial at law, where the evidence is conflicting, stands just as a verdict of a jury, where there have been correct instructions. *Id.*, 389
36. This court does not fail to examine the evidence in records in cases of this character. *Id.*, 389
37. It is proper after judgment to refuse a proposition of law. *Kraemer v. Leister*, 391
38. A motion in general terms on the part of the defendant that the jury be instructed to find a verdict for the defendant, upon the ground that the proof varies from the declaration, will not save the benefit of the objection. *L. S. & M. S. Ry. Co. v. Ward*, 423
39. This court declines to consider the case presented, for the reason that the record filed is not certified to as being a full copy or transcript of the record in the case. *Atkinson v. Linden Steel Co.*, 448
40. Only prejudicial errors justify reversals. *Cartier v. Troy Lumber Co.*, 449
41. Where a jury takes figures from the calculations of counsel on both sides of a case on trial, one of the parties can not complain thereof. *Id.*, 449
42. It would seem that the control of a court over the addresses of an attorney in a given case, is limited to confining him in his opening to what may fairly be anticipated as probably coming in issue during the trial upon the facts as the advocate states them, and in his closing to the evidence which has been put in, and in both, preventing obscenity and profanity, and within very indefinite bounds restraining license and intemperate speech. *Id.*, 449
43. A paper attached to a bill of exceptions after the signature of the trial judge should not be considered. *Hursen v. Lehman*, 489
44. Nor instructions so appended instead of being copied therein. *Id.*, 489
45. Where a party desires a trial by jury, and objects to a trial by the court, it is erroneous to refuse his request; but if present by counsel, who fails to object, the right to a jury is waived. *The Chicago Driving Park v. West*, 496
46. It is proper to refuse leave to file a plea, bad in substance. *Id.*, 496
47. Only appellants can assigns errors. *Robbins v. Butler Paper Co.*, 512
48. Cross-errors can only be assigned on decrees appealed from. *Id.*, 512

PRACTICE. *Continued.*

49. Going to trial without an issue being made up on one of the pleas is a waiver of the formal issue thereon. *Douglas v. Matson*, 538

50. The refusal to allow a new plea to be filed at the trial can not be assigned as error in the absence of any showing as to the grounds of the request. *Id.*, 538

51. Where an appeal from a justice is taken by filing bond with the clerk of the court and the transcript is not filed ten days before commencement of the term, the court has no jurisdiction to try the case at that term, except by consent of the parties. *Van Stavern v. Sears*, 546

52. When an interlocutory order has been made in a given case by one judge, and further proceedings are had therein before another judge in the same county, each judge may conduct the proceedings before himself in accordance with his own opinion at the time, whether it conflicts with an earlier interlocutory order or not, and it is immaterial whether that earlier order was made by himself or another judge. *Niagara Fire Ins. Co. v. Scammon*, 582

PRINCIPAL AND SURETY—See ADMINISTRATION, 5; GUARANTY, 3.

RAILROADS—See PERSONAL INJURIES.

1. In an action brought by a municipality to recover from a railroad company the amount of a judgment recovered against it by a property owner injured through the construction of a viaduct by said company, the right to lay certain tracks having been granted it upon the understanding that it should pay the cost and expense of the viaduct in question and legal damages resulting, this court declines to interfere with the judgment for the plaintiff. *C. & Q. R. R. Co. v. City of Chicago*, 206

2. The fact that the trains of a railroad company have for several years been daily run over the track of another company, is *prima facie* evidence of a contract between such companies to that end; and in case the company owning such track takes the ground that the company so using it is a trespasser, the burden of proof is upon it to show that such was the case. *Penn. Co. & U. S. Y., etc., Co. v. Ellett*, 278

3. In an action brought by an administrator for the recovery of damages for the death of a third person, alleged to have been occasioned by the negligence of railroad companies, this court holds that the fault of the declaration involved was cured by the verdict, and declines to interfere with the judgment in behalf of the plaintiff. *Id.*, 278

4. In an action brought to recover from a railroad company damages alleged to have been sustained by plaintiffs, by depreciating the market value of certain lots owned by them by means of the erection of a viaduct and the laying of certain tracks, this court holds, in view of the evidence, and of the fact that the verdict for plaintiffs did not show what portion of the damages assessed were based upon injuries arising from the laying of tracks, and of a misleading instruction touching the measure of damages, given in behalf of the plaintiffs, that the verdict in their favor can not stand. *A. T. & S. L. R. R. Co. v. Lenz*, 330

RAILROADS. *Continued.*

5. In actions brought for the recovery of damages from a railroad company for the death of two children and injuries to their mother, alleged to have been occasioned by its negligence, this court declines, in view of the evidence, to interfere with the verdicts for the plaintiffs. *C., M. & St. P. Ry. Co. v. Wilson.* 346

6. A railroad company does not owe the duty of having a flagman at a crossing, to one injured while attempting at such crossing to climb upon one of its trains. *C. & W. I. R. R. Co. v. Roath,* 349

7. The fact that one who attempts to climb upon one of its moving trains is an infant in years and consequently without discretion and not chargeable with negligence, does not, in case of injury, give rise to liability on the part of such company, no duty incumbent on it being involved. *Id.,* 349

8. In an action brought to recover from a railroad company, for the loss of a leg by a child six years old, alleged to have occurred through its negligence, this court holds, that in view of the erroneous modification of certain instructions, the verdict for the plaintiff can not stand. *Id.,* 349

9. Liability upon the part of railroad companies for failure to give the statutory signal is not limited to injuries caused upon a crossing, alone, but also attaches where the same occurred within a short distance thereof, but still in the highway along which the tracks are laid. *Penn. Co. v. Backes,* 375

10. In an action brought to recover from a railroad company, for personal injuries alleged to have occurred through its negligence, this court declines, in view of the evidence, to disturb the verdict in behalf of the plaintiff. *Id.,* 375

11. The public has the right to suppose, from the long and uniform practice of taking on and letting off passengers at a place other than a regular station, that its accommodation was the design, and that the railroad company had issued a general standing invitation to use the spot in question and so much ground adjoining as is necessary and convenient, for the purposes of a station. *L. S. & M. S. Ry. Co. v. Ward,* 423

12. In such case a person may properly wait for a train at any point adjoining the usual stopping place, where it might reasonably be anticipated that any part of the train adapted to the accommodation of passengers would come to a stand. *Id.,* 423

13. Railroad companies are not liable to trespassers for anything short of wanton or wilful negligence. *Id.,* 423

14. In an action brought to recover from a railroad company, damages for personal injuries alleged to have been caused by its negligence, this court holds, that a certain rule as to movement of trains of defendant was properly received in evidence, and declines to interfere with the verdict for the plaintiff. *Id.,* 423

15. It is wanton and reckless negligence on the part of a railroad company to send cars, under no control, across public streets. *L. S. & M. S. Ry. Co. v. Johnson,* 431

RAILROADS. *Continued.*

16. In an action brought to recover damages from a railroad company for personal injuries alleged to have been occasioned by its negligence, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff. *Id.*, 431

17. In the case presented, this court declines to interfere with the judgment for the plaintiff, for an injury alleged to have been occasioned by the sudden starting of a train of street cars. *Chicago City Ry. Co. v. Hastings*, 434

18. In an action brought to recover from a street railroad company for personal injuries alleged to have been occasioned by its negligence, one of its trains having collided with the wagon of the plaintiff, this court declines, in view of the evidence, to interfere with the verdict in his behalf. *Chicago City Ry. Co. v. Brady*, 460

19. In an action brought to recover from a street railway company for personal injuries arising from being struck by a runaway team belonging to such company, no excuse being offered by it for the escape of the same from the driver thereof, this court declines to interfere with the verdict for the plaintiff. *North Chicago St. Ry. Co. v. Louis*, 478

20. Carriers of passengers are required to exercise the highest degree of practicable care and diligence under the circumstances of a given case, to protect their passengers from injury. *Chicago City Ry. Co. v. Engel*, 490

21. Where it is shown that a passenger in a street car was injured by reason of an accident, the burden is upon the carrier to account for the same. *Id.*, 490

22. In an action brought to recover from a street railroad company for personal injuries alleged to have been occasioned by its negligence, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff. *Id.*, 490

REAL PROPERTY—See AGENCY; CONTRACTS, 2; SALES, 5.

1. This court holds that the builder of a party wall, under an agreement with an adjoining proprietor that the same may be used by him upon payment of one-half the value thereof, is entitled upon bill filed to a decree for compensation for the same, and providing that the amount involved shall be a lien upon the premises of such proprietor using the wall but refusing to pay therefor. *Nelson v. McEwen*, 100

RECEIVERS—See INSOLVENCY, 12; PRACTICE, 13.

1. The pending of a receiver's petition that attaching creditors of his insolvent be required to discontinue proceedings in another State, and to release and pay over moneys in their hands without a restraining order, has no effect on such suits. *U. S. Express Co. v. Smith*, 90

2. A receiver employing counsel to enter the appearance of the insolvent in a given suit, and the procuring by him of the release of funds attached therein, through the offices of a surety company, operate to make him a party thereto. *Id.*, 90

REDEMPTION—See MORTGAGES, 3.

RELEASE—See ACTIONS, 1.

REPLEVIN—See INJUNCTIONS, 1, 2.

SALES—See DECEIT, 1, 2; LANDLORD AND TENANT, 10.

1. The delivery of a list of office fixtures to the purchaser of stock in a corporation, subsequent to the sale, will not estop the seller, in the absence of an understanding upon the subject, from recovering articles named therein, upon the ground that they were not included in the sale, such list forming no inducement for the purchase. *Campau v. Bemis*, 37

2. In an action brought to recover the value of goods sold and delivered, a check in payment having been given a salesman of the plaintiffs, the same or its proceeds never having been turned over by him to them, this court holds that such delivery was properly made, and was equivalent to delivery to the plaintiffs, and declines to interfere with the judgment against them. *Bailey v. Pardridge*, 121

3. In an action involving the sale of a lot of solder, the contention being as to the quantity sold, this court holds, in view of the improper admission of certain testimony on behalf of the plaintiffs, that the verdict in their favor can not stand. *Fairbank Canning Co. v. Weill*, 366

4. In an action brought to recover for goods sold, a notice of set-off being filed setting forth a previous agreement touching discounts, this court holds that in view of such notice, the evidence introduced by the defendant can not be looked upon as a surprise, and that the plaintiff was negligent in failing to produce upon trial the contract relied on. *Dueber Watch Case Mfg. Co. v. Lapp*, 372

5. In an action brought for the recovery of commissions, alleged to have been earned by the plaintiff on the sale of real estate made through his agency, this court holds, in the absence of evidence going to show that he in any way influenced the sale in question, that the verdict in his favor can not stand. *Commercial Nat. Bk. v. Hawkins*, 463

6. Evidence that certain goods had been ordered by plaintiffs and been consigned and shipped to them, and that they had examined the goods and were just about to pay the freight when the goods were attached by a creditor of the consignor, is not conclusive that plaintiffs were entitled to the goods, in the absence of any showing that plaintiffs had paid or agreed to pay for them. *Matson v. Taylor*, 549

7. In such case the court should not take the question of ownership from the jury. *Id.*, 549

8. Upon a sale of personal property in the possession of the vendor a change of possession is essential to protect the title of the vendee against attaching or execution creditors of the vendor. If the possession remains with the vendor it is fraudulent *per se* against creditors. *Lowe v. Matson*, 602

9. An assignee for the benefit of creditors is a volunteer who pays no consideration, and on principle the law can not extend to him any

SALES. *Continued.*

greater lenity than to *bona fide* purchasers for value. Where the rule operates against the latter it is also enforced against the former. *Id.*, 602

10. If the property is left in possession of the vendor's agent the change is constructive only, the possession of the agent being that of the principal; and although a servant agrees, in his master's presence, to hold possession for the vendee, his possession remains that of his master so far as creditors of the latter are concerned. *Id.*, 602

11. To entitle one to rescind a sale of goods that has been induced by false and fraudulent statements, the vendor is only required to show the statements made, that he relied upon them to his injury, and that they were false. The intent or motive with which such false representations were made need not be shown. *Reed & Co. v. Pinney & Co.*, 610

12. If the vendee of goods falsely states his financial ability and obtains the same on the strength of such statement, the vendor may, on discovering the fraud, retake the goods, and in such case it is wholly indifferent what the vendee's intention in fact was with reference to paying for the same; his good faith and intention to pay, based on a belief that he will be able to do so when the time of payment arrives, will not prevent the vendor from rescinding, on the ground that the sale on credit was induced by the false representations. *Id.*, 610

13. A vendee may be guilty of fraud which will entitle the vendor to rescind the sale, without any false statement whatever, if, knowing that he is insolvent, he buys goods with the intention not to pay for them. To constitute fraud in such case there must be a preconceived design never to pay for the same. *Id.*, 610

SET-OFF—See JUDGMENTS AND DECREES, 5; SALES, 4.

1. In order to establish as a set-off the plaintiff's liability to account for property of the defendant, which has been disposed of by plaintiff, it must be shown that the property was of some value. *Litch v. Clinch*, 654

SETTLEMENTS—See NEGOTIABLE INSTRUMENTS, 14, 15.

SPECIFIC PERFORMANCE—See CORPORATIONS, 10.

STATUTES—See JURISDICTION, 6.

1. The word "absent" with reference to a person in a statute other than of limitation, must be taken to mean one who has been present, not a non-resident. *Wheeler v. Wheeler*, 123

2. The statute touching the giving of signals by railroad companies at crossings, applies to crossings in cities. *Penn. Co. v. Backes*, 375

TAXES—See ASSESSMENT, 1; INJUNCTIONS, 3. .

TORTS—See ACTIONS, 4.

TRADE MARKS—See INJUNCTIONS, 4.

TRESPASS.

1. An arrest without process must be justified in order to excuse whoever concurred in causing it. *Cudahy v. Powell*, 29

TRESPASS. *Continued.*

2. All persons who order, direct, aid, abet or assist the commission of a trespass, are liable for all the damages. *Id.*, 29
3. In an action brought to recover damages for causing the arrest of plaintiff upon the ground of larceny, this court declines to interfere with the verdict in her behalf. *Id.*, 29
4. In an action of trespass, brought for the recovery of damages for injuries suffered by reason of an assault and battery, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff. *Corcoran v. Poncini*, 130
5. A person employing another to take possession of certain premises is liable for actual damages to the person dispossessed. *Leiter v. Day*, 248
6. A ratification of a trespass is not a ground for vindictive damages. *Id.*, 248
7. In an action of trespass brought against the defendants for attaching goods in the hands of mortgagees, the mortgagor being indebted to them, the contention on the part of defendants being that the mortgages were void under the statute of the State of Nebraska concerning assignments, the goods in question being located therein, this court holds that the evidence does not justify the view that the mortgages in question were intended as preferences, but does warrant the assumption that they were given to pay *bona fide* debts, and declines to interfere with the judgment for the plaintiff. *Kahn v. Kohn*, 437

TRIALS—See APPEAL AND ERROR, 3; EVIDENCE, 14, 15, 16, 17, 18.

TROVER.

1. In an action of trover brought to recover the value of certain paintings, this court holds that they were the property of the plaintiff, that the same was demanded by him, and that defendant's orders to an employe to retain them amounted to a conversion. *Campau v. Bemis*, 37

TRUSTS—See WAREHOUSES, 1.

1. Before equity can charge as trustee one who has obtained title to goods from the vendor by fraud, not only must the fraud be shown, but it must also appear that the parties are in such a situation that a rescission of the fraudulently induced contract can be effected. The effect of a rescission must be to restore the *status quo*. *U. N. Bk. v. Goetz*, 396
2. Where goods can not be reclaimed through the intervention of rights of third parties, or the identity thereof has been lost, the vendor is not confined to the terms of the fraudulent contract for a remedy, but may disregard the same and recover damages for the consequences of the fraud as a substantive cause of action; and where money is obtained by fraud or under a fraudulent contract, it may be recovered at law in an action for money had and received, and the facts which will prevent the deceived party from reclaiming the title to goods at law, will prevent him also in equity, and unless the goods can be identified in the hands of the vendee, or the money can be clearly and dis-

TRUSTS. *Continued.*

tinctly traced, conditions do not exist which permit the resumption of title by the defrauded party, and authorize a court of equity to restore the goods or money as property, the title to which never passed, and which the perpetrator of the fraud hold as trustee for the defrauded.

Id., 396

3. In such cases the jurisdiction of courts of law and courts of equity is concurrent, and the principles upon which they proceed is identical.

Id., 396

4. Upon a bill filed for a specific lien upon the general assets of an insolvent firm for money loaned upon alleged fraudulent representations made by it from time to time as to its business, for the purpose of establishing a credit, the bill declaring that the fund in question can not be identified or traced, this court declines, in view thereof, to interfere with a decree denying the relief prayed. *Id.*, 396

5. When certain notes and a deed of trust given to secure them are executed at the same time, each note holder having an interest under said deed, the law blends all the instruments and construes them as one. *Hennessey v. Gore*, 594

6. In a controversy involving the giving of notes secured by a deed of trust conveying leasehold interests, it being contended by defendant that the remedy of the holders of certain two and three year notes was confined to foreclosure, the same not being due by their terms, said holders taking the ground that the maturity of said notes had been accelerated by their election to declare them due, in conformity with a provision in said deed, this court holds that the action at law upon said notes was properly brought; that it cut no figure, that all the creditors involved failed to declare the principal of said deed of trust to be due; that in view of the wording of the special count of the declaration it was doubtful if there was any exercise of the power granted, and that the judgment for the defendant can not stand. *Id.*, 594

WAIVER—See JUDGMENTS AND DECREES, 7.

WAREHOUSES.

1. The transfer to an innocent party of a warehouse receipt erroneously claiming to cover goods in store of a given firm, a member thereof knowing of such mistake, will render such firm liable to the warehouseman as trustee of the receipt or the proceeds thereof. *McDonald v. Western Refrigerating Co.*, 233

2. In an action brought by a warehouse company to recover an amount paid to redeem a receipt given by it, the same through mistake claiming to cover goods in its hands, this court holds that the defendant can not, in the absence of a plea in abatement, raise the point of the non-joinder of a co-partner; that, in view of the facts, he is estopped from taking the position that payment by the plaintiff to the holder after knowledge of the mistake operated as a bar to the recovery thereof; and declines to interfere with the judgment for the plaintiff. *Id.*, 283

WILLS—See ADMINISTRATION, 1.

7897 248
Ev. 511.

